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TENTH ANNIVERSARY OF THE ETHICS IN GOVERNMENT ACT AND REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

APRIL 12 AND 13, 1988

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TENTH ANNIVERSARY OF THE ETHICS IN GOVERNMENT ACT

TUESDAY, APRIL 12, 1988

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:35 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Carl Levin, Chairman of the Subcommittee, presiding.

Present: Senators Levin and Stevens.

Staff present: Linda J. Gustitus, Staff Director and Chief Counsel; Curtis Copeland, Professional Staff Member; Mary Berry Gerwin, Minority Staff Director and Chief Counsel to the Minority; and Frankie de Vergie, Chief Clerk.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Good morning, everybody.

We will begin our hearing this morning on the tenth anniversary of the Ethics in Government Act. Ten years ago this October 26th, President Carter signed into law the Ethics in Government Act. Its purpose is to preserve and promote public confidence in the integrity of Federal officials through financial disclosure, restrictions on post-Government employment, and independent investigations of alleged wrongdoing by Government officials.

Title IV of the Act establishes the Office of Government Ethics "to provide overall direction of Executive Branch policies relating to preventing conflicts of interest," and it is in the context of reauthorizing that office—the Office of Government Ethics—which would otherwise expire on October 1st that we have the opportunity today to review where we have come over the last ten years.

To what degree have we achieved the purpose we established for this law—to preserve and promote public confidence in the integrity of the Federal Government?

This is obviously a very appropriate time to be asking this question as the issue of ethics in Government has become front page news and the cover story for our leading periodicals and TV news programs.

In the spring of 1986, the Washington Post published an article listing over 100 current and former Administration officials who were alleged or proven to have been involved in ethical misconduct. I am told by the House Civil Service Subcommittee that the list has now grown to over 200.

The House Ethics Committee has been confronted with a spate of ethical charges against current Members of Congress, and Administration witnesses have admittedly misled Congress in their hearing testimony—and on and on.

We seem to be confronted with allegations of unethical conduct at every turn in our public life. Some of the questions we are asking at our hearing today are: Is it as bad as it appears to be? Have we made any progress in the last ten years? How do we reestablish an ethical core to Government service?

I am afraid the current laws just are not working very well. First, there appears to be a serious lack of criminal enforcement of ethics statutes. We are making available today a report by the GAO in which the GAO looked at the number of cases involving allegations of ethical misconduct that were referred by Inspectors General of ten agencies to the Department of Justice for criminal investigation and possible prosecution. They reported that in calendar years 1985 and 1986, of one hundred twenty-four allegations referred to the Department of Justice only two were prosecuted. In thirteen of the cases, Justice had not yet determined whether or not to prosecute. In the remaining one hundred seven cases, the Justice Department had decided not to prosecute. That means there is a referral of an allegation of ethical misconduct to the Justice Department pursuant to a criminal statute. When that happens, there is only a two percent chance that a criminal prosecution will result.

These statistics seem to indicate a weak commitment to criminal enforcement of the ethics laws. We will be asking the Justice Department later on this morning to explain this.

With criminal prosecutions a rarity, ethics enforcement would seem to rely, then, on administrative action, that is, sanctions imposed by the employing agency which can include anything from a letter of reprimand to a firing.

In terms of administrative action, however, the record seems to be equally poor. Ethical allegations involving top officials in the Executive Branch go on for years without reaching a definite conclusion, and even when a conclusion of some sort is reached, the administrative sanctions imposed are minimal to nonexistent.

In addition, while lower-level employees have been subject to administrative sanction for ethical infractions, it appears that there is a double standard when it comes to the top political appointees.

Take the case of John McKean, former Chairman of the Postal Board of Governors. The Office of Government Ethics eventually concluded that Mr. McKean appeared to have improperly influenced the Postal Service to hire a law firm which was a client of his accounting firm. The improper activity took place in June of 1984. Pursuant to a request in September of 1984 for an investigation from the Congress, the Postal Inspector issued a report in January 1985, laying out the basic facts. A criminal investigation by the Department of Justice ensued and was completed in August of 1986.

On August 15, 1986, John Keeney, then Deputy Assistant Attorney General of the Criminal Division—he will be representing the

Justice Department in testimony later this morning—wrote to David Martin, then Director of the Office of Government Ethics, that the Justice Department had declined prosecution, a not surprising outcome, given the recent GAO report. He stated in that letter that, "Our decision is not based on a determination that no evidence of a criminal offense exists. It is based instead on several considerations which in our judgment call for a declination, including the availability of appropriate administrative action."

Then, in September of 1986, David Martin wrote to Peter Wallison, then Counsel to the President, saying that Mr. McKean's conduct demonstrated either his "misunderstanding or complete disregard of the ethical principles set forth" in the Executive Order establishing the standards of conduct. He said he was bringing this to the President's attention so the President could take the appropriate action. That was September of 1986.

From late 1986 through April of 1987, there was Congressional interest expressed to the President that he take action with regard to Mr. McKean. We were advised by phone that there would be an effort to have Mr. McKean resign, but that the White House Counsel's office was waiting for Mr. McKean's next visit to Washington to make that suggestion—in other words, "we'll try to get him to resign, at his own convenience."

McKean finally resigned on May 4, 1987, 3 years after the ethical violation and eight months after the letter to the President from the Office of Government Ethics. If my memory serves me correctly, the President said nothing at the time about not tolerating such conflicts of interest. Mr. McKean just existed quietly.

Now, that is a classic case of how ethics cases involving our top Executive Branch officials should not be handled. Years go by during which the Federal official continues to serve and continues to get paid. When action is finally forthcoming, it is disguised as a voluntary resignation. The President is silent on the ethical implications. The rest of the Federal work force observes this lack of interest and responds accordingly.

Another example is that of the Attorney General. We are all awaiting the final report of the Independent Counsel on his criminal investigation. But, with all the dubious ethical activities of the Attorney General in his almost 8 years of service with the President, there has not been one finding by the Office of Government Ethics or the ethics officials at the White House or the Department of Justice as to the Attorney General's compliance or non-compliance with the Executive Order or agency guidelines and regulations, and there has been no administrative action. That is not because there has been a determination that there has been compliance; it is because the way the system works. Administrative determinations are deferred pending the conclusion of the criminal investigation. So the public has yet to have the benefit of an official determination as to the Attorney General's compliance or non-compliance with the standards of ethical conduct for Federal employees.

The result is that the Attorney General's conduct hangs out there to be judged only in a criminal context. And if no indictment is forthcoming, that can be used to blur the other central issue—

whether his performance has met the ethical standards established by Executive Order and regulation.

The standards of conduct for Federal employees are much more demanding—as they should be—than merely avoiding criminal conduct. They go to the heart of maintaining the public's trust—and that is avoiding any appearance of a conflict of interest, as well as actual conflicts of interest. The current system renders the public an injustice by effectively substituting, in many instances, at least, the criminal proceeding for the administrative process. In doing so, it distorts the existing standards for ethical conduct.

We will explore at these hearings how the process for reaching an administrative finding is frustrated; how administrative proceedings in the area of ethics should proceed simultaneously with criminal investigations; and just what authority the Office of Government Ethics should have to order administrative sanctions when ethical violations occur, or at least to issue findings and specific recommendations. And we will explore ways of changing the meaning of the phrase "everybody's doing it" so it can someday mean everybody is doing the right thing as opposed to everybody is doing what they can get away with.

Our witnesses today are here to discuss with us where we are in our attempt to progress toward ethical behavior by our Government officials. We will examine just what the Ethics in Government Act has accomplished during the past ten years, where we are now, and where we can and should go.

Tomorrow, we will be looking specifically at the Office of Government Ethics in preparation for its reauthorization.

Senator Stevens, do you have an opening statement?

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Thank you, Mr. Chairman.

I am here because Senator Cohen is not able to be here this morning.

It is my hope that this hearing will be a non-partisian exploration of the last decade under the Ethics Act. I see people I have known in my professional life here including Mr. Cox. I trust that our inquiry will not take on the overtones of politics in a Presidential election year. If that occurs, I think it will be to the detriment of the Ethics in Government Act per se, and I am here to try to see to it that that does not happen.

So I would just hope everyone would keep that in mind.

Thank you very much.

Senator LEVIN. Thank you, Senator Stevens.

[The opening statement of Senator Heinz follows:]

OPENING STATEMENT OF SENATOR HEINZ

Mr. Chairman, I want to commend you for holding these hearings on government ethics and specifically, on the Office of Government Ethics whose authorization will expire on September 30, 1988. As we note the 10th anniversary of the Ethics in Government Act, it is appropriate that we pause for a moment to review our efforts to build the public's confidence in its national leadership.

Since 1978, the Office of Government Ethics has directed executive branch policies to prevent conflicts of interest by Federal officials. This work is essential, not only to the smooth and effective functioning of government, but to the people's faith in their elected representatives and in government generally.

An important goal of the 1978 Ethics in Government Act was to establish a central Federal agency to quickly respond to allegations made against high-ranking Federal officials. Over the next two days the subcommittee will hear expert testimony regarding the state of government ethics, and consider possible improvements to the act. Our goal is to assure that no one, particularly those in whom the public trust resides, is above the law.

It has been five years since the Governmental Affairs Committee last examined the Office of Government Ethics. This year's reauthorization is particularly important given the forthcoming Presidential transition.

In a very short period of time, over 1,200 appointed officials that will be chosen to serve at the pleasure of the President, with Senate advice and consent. The Office of Government Ethics will be charged with a crucial role when it reviews the finances and backgrounds of these candidates for possible conflicts of interest. Both the members of this committee, and our colleagues in the Senate will use this information to make their decision on the leadership of the next administration, and ensure that the integrity of government programs is maintained and improved.

I look forward to reviewing the testimony of these two days of subcommittee hearings. Thank you, Mr. Chairman.

Senator LEVIN. Our first witness today is Archibald Cox, Chairman of Common Cause, Professor at Harvard University, former Watergate Prosecutor, and an old friend of many of us in Congress.

TESTIMONY OF ARCHIBALD COX, CHAIRMAN, COMMON CAUSE,[1] ACCOMPANIED BY ANN McBRIDE, SENIOR VICE PRESIDENT

Professor COX. Thank you, Mr. Chairman.

Senator LEVIN. I'm sorry. Ann McBride is also with you, I believe?

Professor COX. That is correct.

It is a pleasure to see both old friends again.

I appreciate very much this opportunity to appear before the Subcommittee and to give the views of Common Cause and also my personal views on the governance under the Ethics in Government Act and, more broadly, the state of ethical standards in Government, because you are surely right, Mr. Chairman, in saying we have come to a dangerous crisis. The headlines are filled with news of corruption and moral decay, not just in Washington but also often in financial centers. And the challenge now is how to restore faith in public service, dignity, respect for the general public interest, not only by all officials in the Executive Branch but by all elected representatives in Congress.

Because of the breadth of the challenge, I ask your indulgence for a few minutes to try to put the problem in a larger, perhaps even a philosophical context, and then to come more down to particulars.

I cannot help reflecting that for the past year we have been celebrating the Bicentennial of the signing of the Constitution. If the Framers could look on us today, they would doubtless find much to envy and a good deal of which to be proud; but if they were to focus on the attitudes dominating the way in which much public business is conducted in Washington, I think they would be sadly depressed.

They were not unaware of human frailty, but they did sincerely believe, teach, and strive to practice the philosophy that public office is a public trust, not something held for personal advantage or the advantage of friends or even supporters.

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[1] See p. 95 for Mr. Cox's prepared statement.

The New York Times recently summarized conditions in an editorial: "Whether measured by the rank or the sheer numbers of officials who have come under ethical suspicion and criminal investigation, the amount of sleaze is awesome."

You referred, Mr. Chairman, to the hundred instances to which attention was called in another paper. I would add to those violations of the rule of law not motivated by personal greed which I think are closely linked and would be equally depressing to the Framers.

A National Security Advisor, one of the highest officials in Government, pleads guilty to having deliberately lied to Congress. Congressional committees have found that other high officials deliberately disregarded the laws in their diversion of money resulting from the secret sales of arms to Iran to the contras.

I link the two because it seems to me that both of them result from and also contribute to the decline of the public philosophy that shaped our political ideas and our political lives for most of our history.

The Framers and those who came after them in the nineteenth century and much of the present century had the deep sense that they were engaged in a unique human adventure, binding them all together, binding each generation not only to its parents and grandparents, but to those who could come later, and with confidence that the adventure would move ahead. It was an adventure open to all, but it was an adventure to which all had a duty to contribute by subordinating selfish advantage of any kind, whether money or power, to pursuit of the public good.

Some of that sense, of course, came from geography, from the American Revolution, but much of it goes much farther back to dominant themes that run through the history of Western civilization—even back to the Hellenes, Plato and Socrates.

I cannot resist recalling for all of you Plato's poignant description of the last hours before the death of Socrates when, you will remember, he refused to walk through the door left open by his jailor. "The Athenians have thought fit to condemn me," he explained, "and I have thought it better and more right to remain here and undergo my sentence," even though "these muscles and bones of mine would have gone off long ago, if they had been moved only by their own idea of what was best, and if I had not chosen to play the better and nobler part."

The civilized man prevailed over the "bones and muscles", the baser and acquisitive powers. The civilized man would not cheat the law for personal advantage because, if Athens were to be governed and Athenians were to be free, the government must be by citizens whose basic natures prevailed and who put the law above their own welfare. The need is no less with us.

Socrates was speaking of the citizen's obligation to subordinate personal advantage to the public good and to observe the rule of law, regardless of personal opinion or circumstance. All the more strongly, of course, the philosophy on which America was built calls for officials, particularly the highest officials, to observe the rule of law and to treat public office as a public trust.

Between the two, there is a very important relationship. A free society depends on an extraordinarily high degree of trust in public officials, and the public simply won't give that trust to officials who are not seen to be impartially dedicated to the general public interest. It will not give it to those high in Government who themselves disobey the rule of law that they ask citizens to obey often at the expense of their own self-interest. It will not give it to those who see Government officials feathering their own nests, exchanging favors with friends and former associates, taking good care of those who provide campaign contributions for the next election.

I think the decline in the public philosophy on which our institutions rest is both the cause and the consequence of the record of sleaziness and official disregard for law that so deeply troubles the American people because they sense that it threatens our institutions.

The decline of the philosophy is cause in the sense that the conduct of Government officials depends on it. The code by which each Senator, each Representative, each other public official judges himself or herself, and the code to which the public expects each of them to conform, will do much more than any law to secure adherence to the old principle that public office is a public trust and to prevent ethical violations—much more than all the statutes in the U.S. Code. Laws can help, for reasons I shall explain in a moment, but they will not do the whole thing.

The decline in the philosophy is the consequence, I think, because gifts, entertainment, arrangements for financial help, large honoraria for small speeches, all-expense-paid trips of inspection, or for appearances at conventions in vacation spots, and the influence-peddling of the Deavers, the Nofzigers, and former Members of Congress, and the exchange of preferred access, which is influence, for campaign contributions—all have a subtle, insidious effect upon the way in which public officials look on their functions.

This was so well-explained by Paul Douglas, whom we will all agree, I think, was one of the great Senators of this century, that I crave your leave just to read one, not very long passage from some lectures he delivered.

"Today," he said, "the corruption of officials by private action takes on a more subtle form than the bribery of early years. The one who would corrupt tries instead by a series of favors to put the public official under such feeling of personal obligation that the latter gradually loses his sense of mission to the public and comes to feel that his first loyalties are to his private benefactor and patron. What happens is a gradual shifting of a man's loyalties from the community to those who have been doing him favors"—from the duties of the citizen, the nobler part that Socrates referred to, to the will of these "bones and muscles."

"His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good. Throughout this whole process an official will claim—and may indeed believe—that there is no causal connection between the favors he has received and the decisions which he makes."

The public sees these things happening across a wide front, I am afraid, and the result is a loss of trust in Government, and therefore a threat to the basic institutions of a free society because they rest upon it.

As I said a moment ago, Mr. Chairman, I don't mean to imply that laws can serve no useful purpose in this area. They seem to me to serve at least three potential purposes.

First, when Congress enacts sound ethics laws, the Congress raises its voice in support of the public philosophy. For Congress to raise its voice today in ways that apply its teachings to its own members as well as others would have extraordinary importance in a period in which we suffer from lack of leadership in this area.

Second, the law can particularize the philosophy, spelling out in detail how it should operate in various human situations.

And third, so long as we are all subject to human frailty, there will be violations, and public sanctions against criminal violations and civil remedies, including appropriate administrative action for others, vindicate not only the laws but also the public philosophy and so strengthen both.

In our written statement, Mr. Chairman, we make a number of concrete suggestions, each in some detail and centered primarily, as these hearings are centered, on the Ethics in Government Act. I would like now just to emphasize four points, and I will try to do it rather quickly.

First, surely, the Committee and the Congress should retain the present requirements for public financial disclosure and should reject the Harvard study and other recommendations that disclosure be only to those who will keep the financial reports secret.

Public disclosure serves three purposes not served by confidential or secret findings. First, experience shows it results in much greater care and attention to the report on the part of the official filing of the employee.

Second, the publicity, the possibility of publicity, stimulates much greater diligence by the Designated Agency Ethics Officers in correcting conflicts of interest.

And third, the publicity is a spur to action as, as we all know, often being the only thing that called attention to conflicts of interest and forced their termination and sometimes the return of improper payments.

It would also seem to me that the proposal to cut from those who must file senior civil servants was a mistake. They often hold positions where they can have great influence on the policies with which laws are administered.

Second, Mr. Chairman, I would submit that the Congress should strengthen and expand the safeguards against the abuses that we know as the "revolving door"—the rush from key positions in Government to act as lobbyists or other representatives of private interest and then go back and use the things acquired in the Government position as a way of getting benefits, hearing and other benefits, for the private interest.

That is a subject which is best and primarily dealt with in S. 237, Senator Thurmond's bill, sponsoring which the Chairman joined, and I would urge that the greatest thing that could be done now for Government ethics, quickly by the Congress, would be the passage of that measure. It would be the greatest thing that could be done now, among other reasons, because it would say yes, we believe that our members, the Senators and Congressmen, should be governed by the same rules that we lay down for others in this instance, with appropriate modifications, and other instances later.

This more specifically may come before your Committee in connection with the Office of Government Ethics, because it is the Office of Government Ethics which, by compartmentalizing various branches of Government, most particularly the Executive offices of the President, invited and built the loopholes about which Independent Counsel Whitney North Seymour, Jr. so eloquently spoke.

I would like to dwell on this point just a little more. The practice of leaving a high position in Government and then functioning as a lobbyist or representative seeking special favors has four harmful consequences.

First, the official while still in office is likely to be thinking of work as a lobbyist, while he deals for the Government with those from whom he later hopes to obtain a job.

Second, it is all too easy to use inside information not available to others for the benefit of the private employer.

And third, the change in roles mixes everyone up; the ex-official will often be able to trade upon the habits of those who are still in Government, deferring to his advice or counsel, wishes engendered during the days when he was senior to or at least an associate of those with whom he now deals in a different capacity.

And fourth come the insidious influences portrayed by former Senator Douglas so well.

I wish I had the words to explain the depth and intensity of my disagreement with those who now argue that the "revolving door" is a public blessing, that there are public benefits in allowing officials to leave the public service one day and the next day to return and lobby the people they have just been working among or who have just been working under them on behalf of a private interest.

Of course there are values to people with Government experience going into private enterprise. Of course there are values in having people with knowledge of private enterprises of one kind or another come into Government. But there are ample ways of enjoying those benefits without the necessity of ex-officials going back and lobbying for private interest at the very spot from which they came or, if they have had influence throughout the Executive Branch or throughout the Government, going back for a short time and lobbying anywhere and using that influence. At the very maximum, all we are talking about here is one year for domestic lobbying; eighteen months for others.

Third, Mr. Chairman, the third major heading, I would urge the reauthorization, but strengthening, greatly strengthening, the Office of Government Ethics. It seems to me there have been two areas of serious shortcoming. One is that the Office of Government Ethics has hardly ever dealt with violations of ethical standards by political appointees. You mentioned one case, the McKean case, but there have been very, very few of those; and yet there was that long list to which you referred earlier.

Second, OGE seems to have paid virtually no heed to a very important part of its statutory authorization, saying that the Office is charged with requiring corrective action on the part of those who have been engaging in violations of the ethical standards applicable to Government employees.

Curiously, as far as I can make out, one of OGE's duties laid upon it by the Congress was omitted from the Executive Order creating OGE in the Office of Personnel Management—itself, I would think a failure to comply with the Congressional directive.

But one way or another, this is an exceedingly important area, and when substantial charges are raised against a political official or any official of ethical violations, there should be some kind of corrective action, correction as to the future, or some kind of sanction imposed in that particular case by the Office of Government Ethics.

I think the four steps which we spell out in our written testimony should be taken.

First, the status of OGE should be elevated. After all, it is quite far down on the totem pole now. The agency charged with this and the caliber of the men who lead the agency should be commensurate with its high responsibilities.

Second, it should be empowered to deal with past violations as well as continuing violations. Just the adjudication would both clarify the law and underscore the importance of adherence to ethical standards. That may require some revisions in the procedure of the Office, and we discuss those in our written statement, in a preliminary way; we would be glad to work with the Subcommittee if we are requested in trying to develop them further.

And of course, fourth, it needs the personnel and funds.

My fourth main point, Mr. Chairman, I will just touch on, but I don't mean to deprive it of emphasis. It is important that Congress put its own house in order. It is important that Congress say "and we mean it" by applying these standards to itself and, in appropriate cases, its staff.

Personally, I think the prime thing would be to reform our present methods of campaign finance, as has been pressed now by a majority of the Senators. But there are others in the area of ethics violations that are the business of your Subcommittee, and I think that they, too, are enormously important.

I thank you for your patience. That completes my statement.

Senator LEVIN. Thank you very much, Professor Cox.

I was interested in your quotation of Senator Douglas, which would have been in the mid-fifties.

Professor COX. Yes, and he was talking about things that seemed trivial in comparison.

Senator LEVIN. That was about thirty years ago. I am wondering—the problem of ethics in Government is an old problem. We are now on the tenth anniversary of the Ethics in Government Act, so my question of you is: Are we better off than, say, we were ten years ago when we passed this Act? Has there been any improvement in terms of the level of ethical behavior in these ten years?

Professor COX. I think we are better off by virtue of the law being on the books. I think we are better off by virtue of the Executive Order spelling out appropriate standards of conduct. But both can be improved. Where there has been failure is in want of leadership in calling attention to those standards, in calling attention to them and their importance, in speaking out against violations.

Senator LEVIN. How would you compare that cause to inadequate laws? You have identified some places where you would strengthen the laws. But you would say, as I understand your testimony, that both the leadership has been inadequate, but that the laws have also been inadequate. Which do you think is a greater cause of the problem you have identified?

Professor COX. Well, I think they go hand-in-hand—laws on the books that no one in authority, in a leadership position, pays much of any attention to, really, maybe they are even harmful. But it is important that they be there, and the important thing is that attention be called to it.

I would think that one of the great things that can happen in this area would be for the next President of the United States, whether Republican or Democrat, to say in his Inaugural Address that he is going to take every step possible to strengthen those in the Government who are policing ethical standards; that he will have no tolerance or patience with those who violate ethical standards, who are constantly trimming and seeing how close they can get to the line, intentionally or otherwise; and that this would give us all a boost. I think this is something that the public cares about; that is the impression I get as I travel some around the country—and not just Common Cause folks, but people who come up to me on airplanes and the like.

Senator LEVIN. You testified that you believe the Office of Government Ethics should be made an independent agency. I believe that is in your testimony. Should the Director of that Office be removable only for good cause?

Professor COX. Yes. He should have the same status in that regard as the heads of the various independent administrative agencies now. Yes, because he must be fearless, and the best way to make a man as fearless as possible is to increase his security.

Senator LEVIN. One of the toughest issues we face is the enforcement of the appearance of the conflict-of-interest standard. The Executive Order not only bans conflicts of interest, but appearances of conflicts of interest.

There was one point where the former Director of the Office of Government Ethics indeed created some real question as to whether or not he even wanted or should enforce an appearance standard. He later on amended that.

But my question is, How do we really enforce that appearance standard? What would you recommend?

Professor COX. Well, they should enforce it by scrutinizing the financial reports, keeping an eye out for such other evidence as may come to the attention of your own office, if you are a director, of the agency ethics officials within their own agencies, and then acting when such things come to mind. If it is a continuing appearance of conflict, that is, a holding of a sizeable investment in some business that comes before that executive official, then OGE should publicly make sure he gets rid of it, unless it is a very borderline case. I can imagine cases in which I think the appropriate answer would be to tell the official quietly to get rid of it. But if it is a planned violation, I think the stigma of having public attention focused on it is important.

I don't want to go back over an old issue, the confirmation of the present Attorney General, but it seems to me the issue that you referred to, with modifying or putting an interpretation on the provisions of the Executive Order that would help the Attorney General get confirmed, as Mr. Martin did, changing from the role he had applied to subordinate officials in the Executive Branch and then later saying, well, we really go back to the earlier rule, is one of the things that erodes, corrodes, the whole atmosphere.

Senator LEVIN. Thank you, Mr. Cox.

Senator Stevens?

Senator STEVENS. It is nice to see you, Mr. Cox. I was just thinking back that it was 40 years ago that I sat in front of you at Harvard Law School as a student, with your brother sitting beside me, too. I remember that.

In your testimony you make a comment about changes proposed by both the Reagan Administration and a recent report by the Kennedy School of Government, Harvard University, which you assert would gut the disclosure law by limiting the type and scope of disclosure, to the detriment of the public interest. My information is that the Administration presented a review of the Act in 1981 that had been first undertaken by the Carter Administration, and was actually submitted by the Reagan Administration in 1981. There has been no such recommendation since then. Secondly, that the Kennedy School of Government at Harvard said that modifying the disclosure statute was one of the many options available to remove some of the detriments, some of the problems as far as people who were inclined not to come into Government service because of the extent of public disclosure required.

To my knowledge, we do not have a recommendation to weaken the financial disclosure provisions in the Ethics in Government Act here before us. Do you know of any?

Professor COX. I think you are about to receive one, Senator.

Senator STEVENS. From whom?

Professor COX. If you have none, then I am delighted.

Senator STEVENS. I am asking you.

Professor COX. Then, presumably, there is no such sentiment on the Committee, and we should all be very pleased.

Senator STEVENS. I know of none that has been presented to us. I mean, the Kennedy School presents publicly a series of options, and the Administration sent a study prepared by the Executive Branch in 1981, and no one paid any attention to it then, and I do not know of anyone who is suggesting it now.

I would like to know, does Common Cause know of any attempts to weaken the Act?

Professor COX. Well, I was aware, or at least I thought I was aware—perhaps I was mistaken—that the Harvard study was about to be called to the attention of this Subcommittee, and that course urged upon it. If I am wrong, as I have said before, all I can say is I apologize for taking up your time, and I am delighted. I think it is great.

Senator STEVENS. I have served on this Committee longer than any current member of the Committee and I know of no such recommendation that has come to us since 1978, other than the Kennedy School report but no one came to this Committee and said:

You ought to change this Act. I have had no knowledge of any such recommendation.

If there is one, I would like to know it. But it seems to me that it is sort of a straw man thrown up by Common Cause, and then you effectively knock it down because none of us are thinking about it.

Professor Cox. Perhaps we were misinformed.

Senator Levin. If you would yield just one moment.

Senator Stevens. Yes.

Senator Levin. My understanding is that we already have been presented with some recommendations from this study, and Mr. Cutler will be testifying on those recommendations. Some of them are to amend the disclosure laws. For instance, public filings should be required only of those individuals who occupy high-level or especially sensitive positions.

In other words, as I understand the recommendations—and we will wait for Mr. Cutler's testimony—they would modify or propose to modify the existing laws. I gather that report has been received by this Subcommittee. I do not know of anyone on the Subcommittee, I would agree with you, who has commented on those yet. But, nonetheless, there is that recommendation from the Harvard study, which I think in fairness would be to restrict somewhat the disclosure laws that presently are on the books.

Senator Stevens. Is that the reference you are referring to? I have not seen Lloyd's statement yet. I cross bridges when I come to them. I will review that when he presents it. Is that the recommendation you are talking about?

Professor Cox. That was what I referred to, as I understood you would hear this morning.

Senator Stevens. But you referred to the Kennedy School in your statement, the Kennedy School of Government report. Is it the same one I am thinking of that presented a series of options?

Professor Cox. I thought there was a more recent one, Senator. I have one here in my papers.

Senator Levin. Senator Stevens, would you yield just for a moment? Maybe I could help.

As I understand it, there is a December 16, 1987, report from the Kennedy School of Government Center for Business and Government. That is, as I understand it, what you were referring to.

Professor Cox. That is what I was referring to, right.

Senator Levin. I believe that Mr. Cutler will be——

Senator Stevens. I will wait for him. But it seems to me that serious proposals weaken the financial disclosure provisions have not been presented. If this is how you view Mr. Cutler's presentation, I will wait for it and take a look at it. I just do not think we ought to have straw men thrown up in the air, though, and blown away.

I have just gone over your statement, and I notice that you have once again stated Common Cause's position about honoraria and a few other things involved in Congressional procedure. It does not quite seem to be within the scope of a review of the Ethics in Government Act, unless you are telling us that you think Congress itself violated the Ethics in Government Act by approving honoraria. Is that your position?

Professor Cox. Well, I referred to a number of things that I think are very closely related to the present crisis. They perhaps are not strictly within the scope of the legislation that this Committee will report. It seems to me that in thinking about these various areas of problems that Senators would wish to give their attention to them; indeed, the whole Congress should.

Senator STEVENS. Well, we have given our attention to that problem a number of times. I wonder if you have ever made a study of those who take honoraria and their private outside income, Mr. Cox.

Professor COX. A study of those who——

Senator STEVENS. The relationship of honoraria and engagements by Members of Congress and outside income. Did you ever study that?

Professor COX. I think not. Not if I understand the breadth of what you refer to.

Senator STEVENS. It seems to me that those of us in Congress have dealt with a rather difficult problem, the relationship of service in the Congress, particularly for a substantial period of time, and outside income. In dealing with the problem, we have tried to recognize that some people come to the Congress very wealthy, and others come early in their career and they are not wealthy. And we have set up mechanisms for those who wish to earn outside income to do so, with full public disclosure and under specific dollar limits and subject to the constant criticism of Common Cause.

Now, I wonder if Common Cause would ever study the whole problem rather than just the part of the problem that you disagree with.

Professor COX. Common Cause has studied certainly a large part of the problem and, as you neglect to say, urged that the curtailment of honoraria be coupled with increases in compensation. It would be very important to those who come to Congress—it is desirable to have them—who are not wealthy. That we have often spoken to and would speak again when the occasion arose.

Honoraria differ from outside income typically, not always, in this respect: honoraria, I think, not infrequently come from people who are hoping to gain access and things like that by getting the Senator's attention. I have often thought that I should oppose any lawyer on the other side, being the only one who could present his case to the witnesses and the judge when I had no chance to present mine. I especially would oppose it when it was done in chambers.

Outside income, as we describe it generally, does not suggest anything that would particularly influence a Representative or Senator to give greater access to the company, rents, royalties, whatever they may be, from which the income comes.

If the source of the income is very closely related to what the Senator or Representative does when he is in Congress——

Senator STEVENS. Just a second, Mr. Cox. That is not quite true. It was at your suggestion in 1978 that Congress barred the receipt of practically all outside earned income. Unearned income you have not commented on too much. In the Senate, as an attorney taught by you, I cannot have outside earned income from a firm in my profession. We have barred that.

It would seem to me that when Common Cause attacks the Congress, you do it in ways that imply that we do these things in a behind the scenes fashion. You imply something unethical.

I just asked my staff to get information on specific votes. The Senate has voted 46 times since 1974 on honoraria. Forty-six times members of both parties have voted openly and have been held accountable by our constituents for those votes. Yet Common Cause persists in letting the public think that somehow or other these are things that happen in the dark of night and are sort of unethical.

Do you really want to let the people of this country believe that all Congresses since 1974—who have voted numerous times, by the way—have been unethical?

Professor Cox. I do not mean to suggest that all Congressmen have been——

Senator STEVENS. I did not say all Congressmen. I said all Congresses. It is the Congress itself that finally tallies the votes and says yes or no to propositions, and honoraria have been voted on many times since then. And they have been part of the scene because of the problems posed by the total limitations on outside earned income that we have imposed at the request of organizations such as yours.

I cannot go practice law with a law firm. Incidentally, members of the House to some extent can, as you know, practice law. We cannot. I do not argue with that necessarily, but I do argue with your assertion that the honoraria provisions of our law and of our Senate rules somehow or other conflict with the subject before us now, which is the Ethics in Government Act. You have been asked to appear before us to talk about the Ethics in Government Act.

Now, do you assert that our receipt of honoraria violate the Ethics in Government Act?

Professor Cox. No, they do not violate the Ethics in Government Act. I do suggest that the failure to put stricter restrictions on honoraria opens the door to favoritism, other kinds of undue and improper influence on committee action, legislative action. Congress would do a great deal better to impose restrictions.

I am aware that there are limitations on outside income in the form of earnings for personal services. Where it was used earlier was that general outside income suggests income from securities, from rents and royalties and the like. You apparently meant it in one sense, and I understood it in another.

Senator STEVENS. I did mean it in another sense because many of us do not have that other outside unearned income.

Professor Cox. No. Of course. Many do not. Many do.

Senator STEVENS. But the standards of Common Cause would open the doors of the Senate primarily only to those who have substantial unearned income if we followed your recommendations entirely. It would, in fact, be the very richest place in the world if we followed your suggestion. It is already fairly rich, Mr. Cox, but there are some of us who are not multimillionaires still, and the majority of Congress recognizes that we may accept honoraria under full disclosure in an annual public disclosure report.

Professor Cox. One way of dealing with the need, I repeat, is to increase the compensation, which is something that Common Cause has regularly supported.

Senator STEVENS. And the people of the United States regularly disapprove of.

Thank you, Mr. Chairman.

Senator LEVIN. The hearing this morning is a general one on the status of ethics in Government on the 10th anniversary of the Office of Government Ethics being created, the Ethics in Government Act being adopted. So we welcome your broad testimony as well as your specific suggestions for changes. Indeed, you were invited here for such broad testimony.

Since you have been pressed by Senator Stevens on the honoraria issue, as I understand your testimony, as part of the overall ethical atmosphere, you have suggested that there be a prohibition on honoraria. As I understand that, you are not saying that some of us now accepting honoraria is illegal; you are saying it should be made illegal?

Professor COX. Oh, yes. Right.

Senator LEVIN. And you gave the reasons for that during your testimony?

Professor COX. No. Not only not illegal, and if I have said anything that suggested the opposite, I regret it. I did not mean to. It was a slip of the tongue.

Senator LEVIN. No, I do not think you did.

Professor COX. I do not even say that under the present standards as they are written down that it is unethical. I think it raises the questions I mentioned. I think some individuals might have trouble in doing it whether the standards required them to or not, that it would bother them. But I am advocating a change in the rule, yes.

Senator LEVIN. You would like to see those standards changed, tightened; is that correct?

Professor COX. Correct.

Senator LEVIN. And you have given the reasons why in your testimony?

Professor COX. Yes.

Senator LEVIN. You gave three or four reasons why you are troubled by honoraria?

Professor COX. That is right, Senator, yes.

Senator LEVIN. All right. I just have one more question.

The Office of Government Ethics has put out a pamphlet that is the ethics guide for all Federal employees, and it is called "How to Keep Out of Trouble." How does that sound to you? Is that the right tone?

Professor COX. I think that is of a piece of what we so often hear that, well, it was not criminal, implying that, therefore, it was honorable conduct. There is great difficulty, of course. "How to Keep Out of Trouble" implies how to avoid the rules or find holes in the rules. That is entirely the wrong tone.

Senator LEVIN. Senator Stevens, do you have any more questions? If not, we will excuse you and thank you both very much for your appearance this morning.

Professor COX. Thank you.

Senator LEVIN. Our next witness is Lloyd Cutler, who is the cochair of the Ethics in Government Committee of the Public/Private Careers Project of the Kennedy School of Government at Harvard

University. We all know Mr. Cutler well from many capacities, including the fact that he is the former counsel to President Carter. He is now in private practice. Again, another old friend of all of us on this Subcommittee.

Mr. Cutler, we welcome you.

TESTIMONY OF LLOYD N. CUTLER, COCHAIR, ETHICS IN GOVERNMENT COMMITTEE, PUBLIC/PRIVATE CAREERS PROJECT; JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY [2]

Mr. CUTLER. Thank you, Mr. Chairman.

I have a very short statement, but before I begin it, I hope while I am going to express some disagreement with my good friend, Professor Cox, I do not want to be understood as his opponent on these issues.

I was involved with John Gardner in the creation of Common Cause. I think Archie Cox is almost an ideal successor to John Gardner, and our firm has served as litigation counsel for Common Cause in a number of its Federal election campaign financing cases.

I do disagree with Mr. Cox on some parts of the issue before us today, but I think in general we are in broad agreement in support of the principles of the Ethics in Government Act.

As you mentioned, Mr. Chairman, along with my successor as counsel to the President, Mr. Fred Fielding, who was counsel for President Reagan, I served as co-chairman of a committee formed to study the Ethics in Government Act organized by the Kennedy School at Harvard University. That was part of a broader Public/Private Careers Project that also covered compensation, recruitment and some of the other aspects of how to improve the quality and morale of our public servants. A copy of that report, I believe, has been submitted to your Committee.

What I want to emphasize today, since you did ask me for my personal views, are just that, although many of them reflect the recommendations of the Committee.

I think, and our Committee thought, that the Ethics in Government Act performs a very necessary function—maintaining public confidence in the integrity of the Federal Government service—and that it should be continued without major change. Our principal suggestions for improvement are as follows:

First, we do think that the financial reporting requirements of the present Ethics forms and regulations are excessive, and that they may have a deterrent effect on recruiting and retaining private citizens for occasional public service in the course of a career spent primarily in private life. In my view, all of the essential financial information needed to disclose and deter conflicts of interest could be developed in a far less intrusive questionnaire. And to whatever extent the excessive detail of the present reporting requirements is mandated by statute—I am not sure that it is—I think that the statutory requirements ought to be modified.

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[2] See p. 149 for Mr. Cutler's prepared statement.

I will give you just two examples of the excessive nature, I think, of these forms. I will not go through my own travails in trying to fill them out.

I served as counsel to a member of the present Cabinet in his own confirmation hearings and whose integrity, I think, is beyond the slightest question. And I assisted in the preparation of his reporting, filling out his forms. He also had the assistance of the officials of the company with which he had worked for many years, of his outside investment adviser, of his own personal accountant, and his records, in my judgment, were in what I would call apple-pie order. And yet after we had filed our forms, we discovered almost by accident that with all this array of help, he had left out a $10,000 investment he had made in a project started by one of his sons to run a college newspaper. And if we had not discovered that, that particular member of the Cabinet would have committed a legal offense and, in addition, would have been subject to great embarrassment. But we found it, and we filed a supplementary form.

Another example is that at the time of the ill-fated Synthetic Fuels Corporation, which I think you will remember, the Government corporation which was to start some projects to develop synthetic fuels before we actually had a critical need for them, the Board of Directors was to consist of some of the finest business executives of the country, plus representatives of other interests. I personally assisted in recruiting, when I was serving President Carter, one of the leading CEO's in the country who had just retired. And I will say for the record he was a Democrat.

He was interested in serving, but he spent a few days going over these forms. And he called us up and he said, "I am just not going to supply this degree of detail"—which would have been required, because to be a director of that Government corporation put you in the status of a special Government employee who had to file. And he declined to serve. That was a loss for the country. He, again, was a man of the most complete integrity. He simply regarded some elements of the form, precisely how much stock within brackets of $25,000 or $50,000 he owned in every single security and every other investment, as a violation of his privacy.

Second, we recommend that when an incoming or incumbent public official is required to divest a particular shareholding or other financial interest to avoid an appearance of conflict of interest—and that often happens—he is presently subjected to a substantial capital gains income tax that he would not have to pay if he were not a public official and did not have to dispose of this asset to avoid the conflict. To avoid the deterrent effect of that tax liability on incoming people—people that a new President, for example, would want to attract to his administration, people whom the entire public would applaud—we recommend that such divestitures be treated as involuntary, or equivalent to the sale of a personal residence, so that no current tax is paid and the taxpayer's cost basis for the assets he sells is rolled over to the new assets he acquires. After all, he is selling them in the Government's interest, and there is no Government reason I can see why he should be required to pay that tax immediately and why he should not be allowed to do the same thing that a homeowner is presently allowed to do when he sells his house and acquires another house.

Senator STEVENS. Do you mind a question right there, Lloyd?

Mr. CUTLER. Yes, Senator.

Senator STEVENS. The same comment applies to the official's wife and her holdings, does it not?

Mr. CUTLER. It would certainly apply to his wife's holdings if she did not independently acquire and manage them. An example is my own wife inherited some shares from her father in small amounts in various companies, which she will never sell. And I am not capable of persuading her to sell them. It is her own, and I cannot persuade her to sell it. She simply held on to those securities.

However, I had to carry the burden of a conflict with those companies and had to disqualify myself in any matter involving them.

Senator STEVENS. Well, I understand that you could do the latter, and I am sure you would. But if they are to be considered as part of the filing, and they are part of the filing, particularly where you file a joint return, I think that the same thing should apply to the assets of the wife which have to be disclosed.

Mr. CUTLER. I would certainly agree with that, Senator Stevens.

Third, the existing substantive law relating to conflicts while in the Government service is suited to its purposes, in our judgment, and does not require change. However, it is scattered over many statutes and regulations which sometimes conflict with one another and would benefit from a new codification. It is also clear that many Government employees do not fully understand the scope and gravity of these provisions, and that additional legal counseling within the Government for new employees and employees who have new problems while they are in service should be encouraged and provided.

I do not think the title of the pamphlet you referred to, Senator Levin, is so bad. It seems to me that something that says how to keep out of trouble is at least going to attract your attention. You might put "How to be an Honorable Public Servant"; that might be a better way. "How to Avoid Breaking the Law" might be a better way. But it is very important to encourage that kind of counseling. I would rather have that pamphlet with the wrong title on it, or an unfortunate title on it, than no pamphlet at all.

Senator LEVIN. Would you prefer a pamphlet with the right title on it?

Mr. CUTLER. Certainly. And I assume that the OGE is going to take your suggestion to heart, and we will soon see a different title.

Fourth, and this is a tender area and one where I am in disagreement, I believe, with Professor Cox and Ms. McBride—and this is more of a personal view of mine rather than our committee—I think the existing substantive law relating to post-employment conflicts is sufficiently Draconian already, and that more sweeping post-employment rules and prohibitions would be a substantial deterrent to attracting and retaining the best young and mid-career professionals.

The only statutory changes I would recommend in these post-employment rules would be—and here Mr. Cox and I are in agreement—to expand the current restrictions to cover former members of Congress and former congressional staff. While it is quite true that there may be a good basis for different restrictions while in the Government service, since Congressmen and Senators face reelection and can be rejected by the public, once they leave the public service they ought to be subject to the same restrictions as anyone else in their post-employment private careers.

Our second recommendation, and this is in the bill, Senator Levin, that you and others, Senator Thurmond, sponsor, would be to provide a civil remedy—this is something I suggested myself—with civil standards of proof to supplement the present criminal sanctions which are far more difficult to enforce. I believe it is true that Mr. Nofziger's case, if the conviction holds up, will be the first actual conviction under the post-employment conflict of interest laws in modern times.

A civil remedy of requiring the wrongdoer, the person who violates the law, to give up the fees earned in the course of that violation would be a very adequate remedy, a supplemental remedy for the Government and one that would be far more effective and a much more real deterrent in my view.

The present bill provides a civil remedy with a penalty of 100 percent. I have no objection to the penalty in principle, but I caution you it runs a risk of changing the standard of proof; and that even though it is a civil penalty, it might be regarded as penal in nature and change the standard of proof to a penal one. I would think simply giving back your fees is an adequate deterrent in those circumstances.

Also, the Government may already, under the *Mississippi Valley* decision of the Supreme Court, the famous Dixon Yates case, many years ago, have a right to rescind any government contract or license obtained in the course of a violation of these post-employment conflict-of-interest rules, or present employee rules as in that case. But it might be wise to add an express statutory right of rescission or revocation of a license in your new bill. That also would be a very substantial deterrent to those who hire former Government employees for their influence in ways that violate the present restrictions of the law.

And finally, I'd like to conclude by putting in a word of mitigation in defense of the custom presently maligned by Mr. Cox and others as the "revolving door".

In an earlier time, those who passed through the "revolving door" were known and praised as citizen-statesmen in the tradition of the Roman general Cincinnatus, a private citizen who was famous for occasionally entering public service, leaving his farm in response to his country's call. That is a noble and invigorating feature of the American Government, a feature that is unique among all of the democracies of the world, and one that is envied by the politicians and businessmen and lawyers of other countries. And in our zeal to deter and punish the few who abuse the revolving door—I am sad to say there are a few, perhaps more than a few—we would be wrong to nail it completely shut.

Mr. Chairman, I have attached to my statement, and I would like to submit for the record, an op-ed piece I wrote at the request of the Scripps-Howard newspapers, setting forth my views on this subject, and on what I regard as the overkill provisions of S. 257, which I would call the "never again Mike Deaver bill," and in my view would deprive succeeding generations of the citizen-statesmen who have served us so well in the past.

I think it is worth your while—it is worth the while of all of us—to recall that our best citizen-statesmen who left private life to enter public service, returned to private life, and re-entered public service at a later stage, for the most part, have never caused the slightest breath of a suggestion that they misused the public trust or violated any of the conflict-of-interest laws. And just sticking to people who have returned to private life in the city of Washington, the so-called "minefield" of Washington, let me refer to Clark Clifford; Bob Strauss; William Rogers, the former Republican Secretary of State and Attorney General; to Philip Buchan, who was President Ford's White House Counsel; and, among the Senators who have returned to private life and law practice here in Washington, Senator Mathias and Senator Muskie. There has never been the slightest suggestion I am aware of that they violated any of these ethical or legal rules about post-employment behavior, and that remains true of the great, great majority of those who answer their country's call occasionally, as Professor Cox did, and I have done, and others have done, in a primarily private career.

What they do is follow what I would call the New York Times or Washington Post or "Sixty Minutes" rule, namely, if you are considering a course of conduct, how would you like to read about it on Monday morning on the front page of the Times or the Post, or watch it on Sunday night on "Sixty Minutes"? And if you have that precept in mind, which is very difficult to write into a law or a regulation, you will steer well clear of the danger zone. And that is what the great majority of those I call citizen-statesmen who have served this country occasionally in the course of a primarily private career have actually done.

That concludes my statement, Mr. Chairman.

Senator LEVIN. Mr. Cutler, thank you very much.

Your last testimony is what I would like to ask you about first. You say it is very hard to write rules that embody the concept of how would you like to read about it on the front page of the morning papers. We, of course, must write those rules and should write those rules—indeed, you have helped draft such rules—and we have got to try to make sure those rules work.

It strikes some of us they have not been working very well, and we are going to try to strengthen them where it is appropriate and keep them balanced so we don't stop people obviously from coming into Government and then leaving. What we want to stop is people inappropriately trading on their Government service for their own benefit in ways which I think you would agree we should not accept. That undermines the very concept of a democratic Government and erodes the very trust in Government that you believe is so important and unique.

So we have got to write those rules. And as you say, one of them is should members of Congress be able to simply leave their position and then come back the next day and lobby their colleagues. We have a rule in the Senate that says you cannot for a year. There is no such rule that I know of in the House.

One of the things that the bill you made reference to would do would be to provide a flat one-year prohibition on members of Congress coming back and lobbying our colleagues. I gather you would agree with that strengthening of the existing law from your testimony.

Mr. CUTLER. I fully agree with that, Mr. Chairman.

Senator LEVIN. Another thing I believe you agree with is the elimination of compartmentalization. We have permitted the Office of Government Ethics to compartmentalize an agency, so in effect somebody can come back and lobby nine-tenths or ninety-nine one hundredths or whatever of their former agency if, in fact, the Office of Government Ethics has decided to split up that agency into a whole lot of pieces.

I believe you support the elimination of compartmentalization; is that true?

Mr. CUTLER. I am not sure, Mr. Chairman, that I would support the elimination of compartmentalization completely. I certainly agree that those, for example, who serve the President in an immediate sense, the people in the West Wing, should not after leaving office deal with any other part of the Executive Office of the President, which of course includes OMB, the Office of Emergency Preparedness and, according to Mr. Meese's famous remark the day of the press conference on the Iran-Contra disclosures, when he was asked whether the President knew, his answer was the President did not know; he cannot be expected to know what all seventeen hundred people on the White House staff are doing.

I agree with that. But if someone serves, let us say, as counsel to the Office of Emergency Planning, which works on earthquakes or flood disasters, and he returns to his law firm and he has a matter that involves dealing with the OMB—he probably saw few, if any, OMB people while he was in Government, and that is still part of the White House—there, it seems to me that a ban on compartmentalization is somewhat of an overkill.

Senator LEVIN. So you do at a minimum support a strengthening of the rules on compartmentalization to at least prohibit some existing compartmentalization.

Mr. CUTLER. Yes, I do.

Senator LEVIN. So that's the second area where you support, "strengthening the existing law."

Mr. CUTLER. Right.

Senator LEVIN. What about a Government-wide ban for a year on the top people in the Executive Office of the President from coming back and lobbying other agencies?

Mr. CUTLER. I think a Government-wide ban is, in my view, excessive. I give an example in this Scripps-Howard article that is attached.

Senator LEVIN. Let me interrupt just a moment. I am referring now only to the top people in the Executive Office of the President.

Mr. CUTLER. Yes. I accept that. But the ban as written calls lobbying anything except a judicial court appearance. It means that you cannot file a paper in a pending environmental matter, in a pending public utility rate matter before the Federal Energy Regulatory Commission. It excludes a good deal of what I would call straight out law practice, not in an *ex parte* sense, but normal, administrative law practice that the former Government official might have been engaged in before he came into the Government and would like to resume.

I also give the example of a lawyer who works both in the food and drug field and in the securities field—and there are a few generalists around—I hope I am still one of them—and he is appointed to be a member of the Securities and Exchange Commission. Well, clearly, he should be subjected to a one-year ban on dealing with the SEC. But what is the sense of barring him from returning to his old part of his practice that was before the Food and Drug Administration? He had nothing to do with it.

Another example is this ban on giving any advice of any kind to a foreign government or government-controlled entity, for eighteen months. Read literally that means that if I, for example, had done legal work for Lufthansa or for the Government of the Federal Republic of Germany, and I was asked on leaving the government to take a case before the European Court of Justice involving a dispute between the European Economic Community, let's say, and Lufthansa—it has nothing to do with the United States. I would be barred not only from appearing in that case—I couldn't even give advice about it.

I submit to you there is no public purpose to be served by that.

Senator LEVIN. What I am asking you about are the areas where you would support strengthening the existing law. You have give us some examples of where you think the bill goes to far.

Mr. CUTLER. Right.

Senator LEVIN. But let me go back, if you would, to what I am asking you, which is where would you "strengthen"——

Mr. CUTLER. I would add civil remedies——

Senator LEVIN [continuing]. If I can just pursue my question. You have identified the Legislative Branch as one area; the restriction of compartmentalization as another area; the addition of civil remedies as a third area. And now let me ask you about the Kennedy School Report, which says that with regard to the one-year cooling off period as pertains to high-ranking officials in the Executive Office of the President, "a bright line should be drawn that precludes such officials from seeking substantive assistance from any Government employee for one year after they have left the Government."

Do you agree with that recommendation?

Mr. CUTLER. If you carve out an exception for administrative proceedings that are not of an *ex parte* nature.

Senator LEVIN. Yes.

Mr. CUTLER. I think I would.

Senator LEVIN. Carve out just what you have identified in the previous——

Mr. CUTLER. Administrative proceedings or other sorts of proceedings where the other side knows exactly what—yes.

Senator LEVIN. But with that exception which you have just identified a moment ago, you would then support the "strengthening" of the law to prohibit the high-ranking officials in the Executive Office of the President from seeking substantive assistance from any Government employee for one year.

Mr. CUTLER. I would do it for a much narrower group than I understand to be included in that group of high-ranking officials.

Senator **Levin**. Well, then, let me state it more precisely. You would support strengthening of the existing law with regard to some high-ranking officials in the Executive Office of the President. Is that correct?

Mr. **Cutler**. Yes, sir.

Senator **Levin**. Okay. Now, that is a fourth area, more narrowly defined than in the bill we have talked about, but nonetheless a fourth area where you would support strengthening the existing law.

Let me now go to a more general question, and it will be my last one. We have a vote on, so we will try to figure out whether to keep going during the vote or otherwise.

Just a general question. The Act has been in existence now for ten years, or nearly ten years, and I am just wondering if you can give us your overall assessment. Do you think ethics in Government is any better or worse because it is here? What is the state of ethics in Government now?

Mr. **Cutler**. Oh, I think it is better, Mr. Chairman, I think partly because of the laws that have been passed, partly because of investigative reporting and scrutiny, partly because of leaks, and in large part because of the very existence of the Office of Government Ethics.

The boundaries of what is proper and what is improper are much more clearly drawn today, and the area of impropriety is much wider.

You have only to read such books as "The Wise Men"—heroes of our past like Averell Harriman and Robert Lovett—or read biographies about the Roosevelt era to see what sitting officials and former officials—Ike, the men I mentioned, Chairman Joseph Kennedy and others—how they behaved. It was a much more informal world, and doing your private business while you were in the Government was a much more common thing.

Senator **Levin**. All right. I am going to turn this over to Senator Stevens, and I am going to run and vote. If I do not get back in time, you can just recess it until I do.

Senator **Stevens**. Yes, I think that is advisable, Mr. Chairman, because I don't want to keep our friend waiting while we are voting.

Let me ask you this, Mr. Cutler. Aren't we seeing a lot of the publicity now associated with violations of this Act, the 1978 Act because it imposed many more stringent rules of conduct on Government employees and former Government employees? Without regard to politics of Administrations before 1978, there were many things that the public heard of in the days of former Presidents where people were not held to account because a statute like the 1978 Act just wasn't on the books.

Mr. **Cutler**. I would date it further back than that, Senator Stevens. You are speaking primarily of the conflict-of-interest rules during employment and after employment, and those have really been on the books since the early 1960's, with substantially little change, and they were picked up, strengthened in some minor degree, and incorporated into the 1978 Act.

Senator **Stevens** [presiding]. I am not trying to get political about it, but I remember so well the allegations that were made during the period of, say, the Truman Administration. We reached an understanding, really, in our country in the mid-Fifties and Sixties of new standards of conduct that ought to be applied to Government service and we codified those standards in statute. This Act carries on that tradition.

I remember when I left the Eisenhower Administration, we got a letter from the President as Presidential appointees—I believe it was a letter, either in a letter or in an enclosure with a letter—urging us to remember the ethical standards that he had stood for as we went back into our private lives. And I did not attempt to practice before the Interior Department, which is the Department I had been in, or the Justice Department, which I had also been part of during the Eisenhower Administration. It was a standard that was requested of us by the President, the person who had appointed us.

Now, I think those times and those actions have really changed a great deal of the feeling of the American public about the measure of ethical conduct that they expect of Government employees. And I am grateful to you for your appearance, because I have to tell you, I agree with your position on the Thurmond bill. I think it goes too far, but I think there are portions of it that ought to be passed. It is unfortunate that we have the argument over the whole bill and do not pass the middle ground or the less strenuous revision—the less extensive revision, I should say, rather than strenuous.

But I do hope that this Committee and other Committees will listen to your suggestion—not one, but several suggestions—they are very good. I personally intend to pursue that one. Without regard to who wins the election this year, there will be some twelve to fifteen hundred people who will be appointed by the next President who are going to face the problem that you have identified, and that is the problem of whether or not the divestiture of securities is going to cause severe financial hardship merely because of the fact that they have accepted an invitation to become part of the Executive Branch and perform a duty that we all should respond to. To respond to the request of a President to participate in the new Administration is probably the highest calling in our democracy, and yet it carries with it a substantial financial burden under these divestiture laws.

So I thank you for that. I think you have identified something that we ought to pursue in this Congress, and I'll do my best to see that that takes place.

Mr. CUTLER. Thank you, Senator.

Senator STEVENS. It is nice to see you. Thank you very much.

We will stand in recess, waiting for the return of the Chairman.

[Short recess.]

Senator LEVIN. We will come back to order.

The next witness is John C. Keeney, who is the Acting Assistant Attorney General in charge of the Criminal Division of the Department of Justice.

Mr. Keeney, we welcome you.

Senator STEVENS. Mr. Chairman, could I insert in the record at this point a statement of Senator John Heinz? Really, he would like to have it at the opening of the hearing today.

Senator LEVIN. That will be made a part of the record at the opening of the proceedings.[3]

Senator STEVENS. Thank you very much, Mr. Chairman.

Senator LEVIN. Mr. Keeney, please proceed.

TESTIMONY OF JOHN C. KEENEY, ACTING ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY JOSEPH E. GANGLOFF, TRIAL ATTORNEY, PUBLIC INTEGRITY SECTION, CRIMINAL DIVISION

Mr. KEENEY. Mr. Chairman, you have my statement. I can go ahead and summarize it or—I know you are running late—and it would not bother me at all if you went directly to the questions, if you prefer.

Senator LEVIN. All right. That is fine with me if we go directly to questions. If you have no preference, we will make it part of the record, then.[4]

Mr. KEENEY. Yes, sir.

Senator LEVIN. Thank you.

Mr. Keeney, does anyone at the Department of Justice keep records on all conflict-of-interest cases?

Mr. KEENEY. In the Public Integrity Section, we keep a record of the conflict-of-interest cases that come in to that particular Section.

Also, we have what we call a FACTS system throughout the Department, which is basically a fraud and public corruption tracking system, where all types of white collar crime cases are supposed to come into the system.

I might say, I don't think it is that effective, but we do have the system in place.

Senator LEVIN. Are the two systems integrated that you have identified?

Mr. KEENEY. No, they are not integrated.

Senator LEVIN. Is there some way of integrating them so we can have one system?

Mr. KEENEY. I don't know, Senator. The problem with integrating them is on the so-called FACTS system, it covers everything across-the-board. And what we are dealing with here today, which is basically as I understand it 18 U.S.C. 201 to 209, they would be an infinitesimal part of the input into the FACTS system.

Senator LEVIN. Well, have you seen the 1988 GAO report that I made reference to in my opening statement?

Mr. KEENEY. This one, sir?

Senator LEVIN. Yes.

Mr. KEENEY. I just read it, just glanced at it now; yes.

Senator LEVIN. All right. That report indicates that of one hundred twenty-four conflict-of-interest allegations referred to the Department of Justice by ten agencies in 1985 and 1986, that the IGs—the Inspectors General—report that only two have been prosecuted. And apparently Justice decided not to prosecute one hundred seven, and has not yet decided whether to prosecute thirteen.

My question is this. How does that rate of prosecution compare with other types of offenses?

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[3] See p. 4.

[4] See p. 156.

Mr. **Keeney**. Senator, may I just digress for one minute?

Senator **Levin**. Sure.

Mr. **Keeney**. I forgot to introduce my colleague Joseph Gangloff, who handles conflict-of-interest cases for us. And I introduce him right now because he has had an opportunity to look at the GAO report, and we are in the process of going back to GAO—because they never identified the cases that they were interested in when they talked to the Director of our Conflicts of Interest Branch. So we don't know—for instance, there is one situation here in the District of Columbia from the Veterans Administration which the United States Attorneys Office carried as one case, we carried as one case. There are something like fifteen or twenty individuals in that, and we don't know whether they were carrying it as one case or twenty. We need to identify the cases to determine what sort of numbers we are dealing with, and that is what we are going to try and straighten out.

Senator **Levin**. Assuming that their numbers are accurate, can you tell us how that rate of prosecution compares with other types of offense?

Mr. **Keeney**. My guess is it might be a little bit lower, but you have to remember, Senator, that in this area you have to keep in mind several things. One is that we encourage the agencies—for instance, I get a fair number of calls from general counsels, and they say, "We have an ethical problem, an 18 U.S.C. 208 possibility. We don't think it is criminal; would you take a look at it?" And the answer is invariably, "Yes. Send it over, and we'll take a look at it."

People in Government, Mr. Chairman, are very conscious of the Ethics in Government Act, and of their responsibilities. We have our own ethics officer in the Criminal Division as does every other component of the Department of Justice. The same thing is true in other agencies. We work closely with OGE. The head of OGE, for instance, meets or has met frequently—or at least I have seen him in the last couple of months—Judge Nebeker, meeting in our cafeteria with our various ethics officers. There is a consciousness.

I get calls from lawyers who just left, and they'll say, "I have been asked to represent so-and-so, and is that a problem?" I refer them to the ethics officer.

A lot of these problems are met before they become serious, and they don't become violations because people ask about them.

Now, I guess your ultimate question, Mr. Chairman, is is there a lower rate of prosecution with respect to conflict-of-interest violations than, say, theft of Government property. I would say probably. But I don't think that that is a significant factor. These are statutes that are looked into very carefully; they are examined, and where there is any indication of a violation, they are investigated rather thoroughly—which comes around to one of your other questions, why does it take us so long.

Senator **Levin**. I'll get to that question in a minute. But what you are saying is that you, without knowing the figures on the other types of crimes, believe this is a lower rate than exists for other types of prosecutions. And I would like to try to get to why that is.

I mean, these are cases which have been referred to the Department of Justice by Inspectors General of the agency, That is a pretty high-level reference, isn't it?

Mr. **Keeney**. A pretty high-level reference, but the frame of reference is what I am trying to explain, Mr. Chairman, that we encourage them to refer if there is any question there is a violation. I would suspect—I cannot speak for them—but I would assume that they would refer more readily a conflict-of-interest allegation against an Assistant Secretary than they would refer a questionable theft of Government property case by a secretary.

Senator **Levin**. Now, according to the report here of the GAO, out of those one hundred twenty-four cases referred to the Department of Justice, the IGs believed that a crime was involved in one hundred fourteen of them. So this is not some situation where, you know, they just refer it to you to give them some advice. They believe in one hundred fourteen cases of the one hundred twenty-four, there was a crime involved, and yet the statistics are that in two cases there was a prosecution.

Mr. **Keeney**. Senator, I think you are overstating it. They have an obligation——

Senator **Levin**. No, I am not overstating it. You mean the GAO is overstating it.

Mr. **Keeney**. No. I think you are not understanding what the obligation of the Inspector General is. They have an obligation to refer when they have substantial indication of a crime. I don't view that as meaning that they believe that this is a criminal case that should be necessarily prosecuted.

They do in some cases; I don't think they do in all cases. But they have an obligation to refer when they have an indicia of criminality. As a matter of fact, we get very upset if they don't. If they go ahead and start an administrative proceeding where we think it should have been looked at criminally, we get very upset.

Senator **Levin**. So you would prefer that they refer a case to you——

Mr. **Keeney**. Yes, sir, in this area.

Senator **Levin** [continuing]. Where there is evidence of a crime, even though there is grounds to proceed administratively?

Mr. **Keeney**. Yes, sir. We would like to——

Senator **Levin**. Well, then, why do you use the fact that there are grounds to proceed administratively as a reason not to prosecute?

Mr. **Keeney**. Well, it is just a factor, Senator. When you evaluate all the circumstances and make a prosecutive determination, your conclusion can well be, as it frequently is, that this is a matter that can be addressed appropriately within the administrative system without criminal prosecution.

Senator **Levin**. It seems to me it is really inconsistent to say that where there are grounds to proceed administratively that you want them to refer it to you where there is evidence of a crime, and then to say as you did in the McKean case that our decision not to prosecute McKean is not based on a determination that no evidence of an offense under Section 208 exists. It is based instead on several considerations which in our judgment call for a declination, including the availability of appropriate administrative action in lieu of criminal prosecution.

Mr. KEENEY. Yes.

Senator LEVIN. That is almost always true, isn't it? Isn't there almost always availability of appropriate administrative action?

Mr. KEENEY. Yes, sir.

Senator LEVIN. Why is that used as a justification not to prosecute if it is always true?

Mr. KEENEY. Well, first of all, if I can back up again, we want to look at the things to see whether or not there are serious indicia of criminal conduct. If there are, and we can make the case with a reasonable expectation of getting a conviction, we proceed. If we conclude that there is no reasonable expectation of a conviction—despite the factors in the McKean case that you are referring to, there is what we call a prima facie case, the elements can be made, but we have no reasonable expectation of conviction—then if there is administrative sanction available, we think it is appropriate for the agency to use it.

Senator, we cannot prosecute every violation of law.

Senator LEVIN. How about two out of one hundred twenty-four, though? That is a pretty low statistic.

Mr. KEENEY. In this context, I don't think it is that low, Senator.

Senator LEVIN. One of the things that you have said in your testimony before the Senate Judiciary Committee a couple years ago was that in conflict-of-interest cases where, "they technically meet the standards of the statute", that "there is no realistic expectation that a jury would convict," then you do not proceed with it. I think you have repeated that just a few moments ago.

Mr. KEENEY. Yes, but Senator, we don't confine that to this type of violation. That is the policy of the Department of Justice. It is the only realistic way in which we can effectively enforce the laws.

Senator LEVIN. That policy that even though a criminal statute's standards have been violated, that if there is no realistic expectation that a jury will convict, that is the policy of the Department of Justice across-the-board?

Mr. KEENEY. Yes, sir.

Senator LEVIN. And is that a written policy?

Mr. KEENEY. It is set forth in our Principles of Prosecution, yes, sir.

Senator LEVIN. Do you know of any other statutes where you have applied that so regularly as you have here?

Mr. KEENEY. We apply it very regularly in false claims, false voucher cases, and so forth; in those cases, we apply it because of the amount of money involved, mostly.

Senator LEVIN. Putting aside that type of case where the amount of money is small, do you know of any other class of cases where you have applied that standard as you have here—where, even though the statute is violated, if there is no reasonable expectation that a jury will convict, that you are not going to prosecute? Can you give me any other crime?

Mr. KEENEY. I'd turn it around. I can't think of anywhere we wouldn't apply it.

Senator LEVIN. Can you think of any other statute where you feel that is as appropriate as you obviously think it is here, as applicable as you obviously think it is here? You have mentioned that both in your letter to us in the McKean case and your testimony here, and in your 1986 testimony in front of the Judiciary Committee. You obviously think that it is unlikely that a jury is going to convict in most of these cases involving ethical violations, conflict of interest violations. You have raised it now three times that I know of. I am just wondering can you think of any other statute where you believe it is as applicable, that point.

Mr. KEENEY. I am trying to think of a particular statute that would be totally analogous. Offhand, I cannot. But I do think that it is very appropriate to apply those standards, the normal standards that we apply with respect to any violation, to these violations.

Senator LEVIN. Are the factors that you apply to that standard—whether or not a jury will convict, the jury appeal standard—are those in your view objective or subjective factors in consideration?

Mr. KEENEY. I like to think they are objective, but obviously, Senator, they are being made by individual prosecutors, so it is not total objectivity; you cannot push a button and get the answer. It is a decision made by experienced prosecutors.

Now, with respect to this particular type of case, as you mentioned, on the McKean case, I signed the letter. I not only signed the letter, but I read the background material with respect to it—as I do with all of these cases, as I do with all cases involving public officials. I was persuaded all along the line—the individual attorneys, the supervisors, and I as the Deputy Assistant Attorney General, were persuaded—that that was not a prosecutable case and that administrative sanctions were an appropriate disposition.

Senator LEVIN. Do you know if administrative sanctions were taken against him?

Mr. KEENEY. I don't know. That was an unusual situation because the sanctions had to be taken by the President. For instance, Judge Nebeker in the Office of Government Ethics has limited jurisdiction to impose sanctions on a Presidential appointee. He would have to address that.

Senator LEVIN. But you don't know, after recommending that administrative sanctions be looked at in the McKean case, whether in fact they were taken or not?

Mr. KEENEY. I don't. I think ultimately, he resigned. But I think in your statement, you suggested that he resigned, and I think you were critical that he was allowed to resign, setting his own time. That's all I know about it, Senator. I think you know more about it than I do.

Senator LEVIN. Do you think that too much time passes in these matters before administrative action one way or another is taken? Do you track down the amount of time that goes by?

Mr. KEENEY. Yes. We are pretty slow, Senator. But on the other hand, we look at them very carefully. Where there is a serious indication of violation of these statutes, the FBI has to go out and do a thorough investigation.

Now, we take them seriously, that's all I can say, and when we take it seriously, it results in slow movement.

Might I add, Senator, that we don't have absolute control over whether or not an agency brings an administrative action. As a matter of fact, I have a dispute now with one of the agencies where I think they are making a serious mistake in proceeding and interviewing witnesses in an administrative proceeding where the same witnesses are being interviewed before a grand jury. We can't do anything about it.

So the agencies are free to do that. We don't encourage them. We ask them not to. But I think if there is any reasonable possibility of a matter being proceeded against criminally, that the criminal process should be followed rather than going into an administrative proceeding where there is discovery, et cetera, that makes a criminal prosecution more difficult.

Senator LEVIN. Thank you. My time is up.

Senator Stevens.

Senator STEVENS. I don't have any questions. As a former U.S. Attorney, I understand you, and I think that if you were to look at things like the illegal gratuities statutes or the Federal election statutes, you find similar situations. I think that the allegations of improper conduct in elections are just so enormous that there is just no way to deal with them. The Federal Election Commission is still dealing with some of the allegations that were made in the 1984 election. I think it is better to have the complaints and prosecute those who are truly criminal than to discourage the complaints because of the statistics. I don't argue with your statistics.

Mr. KEENEY. Senator, I appreciate your mentioning the election cases. They are somewhat analogous to the conflict cases. They present some of the same types of problems with respect to jury appealability.

Senator STEVENS. Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Senator Stevens.

Let me go back to your position that your decision in the McKean case—which is, again, just an example of an approach; it is not to highlight that case any more than as an example—but your decision is not based, you said, on a determination that no evidence of an offense under 208 exists. Your decision, you said, is based instead on several considerations including the availability of appropriate administrative action in lieu of criminal prosecution. I want to ask you again about that one aspect.

Can you think of any case where there is evidence of an offense under Section 208 where an appropriate administrative action is not available?

Mr. KEENEY. Well, if the individual has left the Government, the remedies would be limited. Then you would be limited to a 207(j) proceeding, which would bar him from appearing before the agency. That would be available. That is something we have used three or four times only.

Senator LEVIN. So my question is, Can you think of any time when a criminal proceeding is available where there is no administrative remedy available?

Mr. KEENEY. With a present employee? No. It is always available——

Senator LEVIN. Or even a former employee.

Mr. KEENEY. With a former employee it is not generally available except the 207(j) proceedings.

Senator LEVIN. Well, I am including 207(j).

Mr. **Keeney**. Yes.

Senator **Levin**. So can you think of any case with a present or a former employee where there is not some administrative remedy available?

Mr. **Keeney**. No. There always would be some administrative remedy, Senator.

Senator **Levin**. And if there is always some administrative remedy available, then why do you cite that as a reason not to proceed criminally?

Mr. **Keeney**. Because in our judgment, the availability of the administrative sanction sufficiently addresses the problem, particularly when you are dealing with a convoluted fact situation as we were in McKean.

Senator **Levin**. Did you say "convoluted"?

Mr. **Keeney**. Yes. I am trying to remember, Senator. I hadn't seen your statement earlier, or I would have pulled the McKean file and been able to discuss the whole thing with you. But although the elements were there, it was not the most clear-cut case in the world. It was my judgment and the judgment of all the people who reviewed it that the action we took was appropriate.

Senator **Levin**. Sometimes you give reasons for your declining to prosecute in your letters back to the agencies; sometimes you do not give reasons for declining to prosecute.

Mr. **Keeney**. Yes.

Senator **Levin**. Could you tell us why sometimes you do, and sometimes you don't—particularly since I understand it, the IGs would like that guidance.

Mr. **Keeney**. Well, we are trying to do it right now. In the past, we had at one time a policy of not setting forth the reasons for declination when we wrote back to the agency. We have tried now to be helpful to the agency. If we think that administrative action is appropriate, we either try to set forth in the letter or tell them of the availability of our people to discuss the matter with them.

We should help them out if they are going to take administrative action.

Senator **Levin**. We are in kind of a Catch-22 situation. We defer for criminal investigation, and if possible, criminal prosecution. Sometimes that takes a long, long time. Then, in ninety-eight percent of the cases, it is declined. A lot of time has gone by, and the administrative procedure, which you say is relevant, frequently is now much more difficult to do. Sometimes the refusal to prosecute is used as a clean bill of health. We saw that recently in the Meese case where, at least as of this moment, the Independent Counsel has said that, based on the current evidence, there is no reason to indict. That is then used as a clean bill of health against an administrative procedure under the ethics laws. Whereas, as you point out, an administrative proceeding under ethics laws is frequently the better way to go.

Now, that's a Catch-22. How do we get out of it?

Mr. **Keeney**. Senator, it is a Catch-22 in a sense. But the ninety-eight percent is not the figure with respect to matters that we seriously investigate and take a long time and hold up administrative proceedings.

We frequently, on these referrals from the Office of Inspector General, have a turn-around in ten days to say we are declining prosecution.

What you are talking about is a handful of cases where we have the FBI on the street, as it were, conducting an extended investigation and then concluding that administrative sanctions are more appropriate. It is a very limited number of cases.

Senator **Levin**. In that limited number of cases—and we have identified a number of them here this morning, including the McKean case—in those limited, are visible cases of great public interest—how do we avoid the Catch-22?

Mr. **Keeney**. May I digress for a minute and make another point that I should make for the purpose of these hearings. Senator, what we are dealing with in these conflict-of-interest statutes—207, 208, 209—is a limited category of persons. For instance, on one of these provisions, 207(b)(ii), there are seven hundred employees in the Criminal Division. Do you know how many people are covered by that statute? Five. There are five people covered. We are talking about a limited number of people. Because it is a limited number of people, they tend to be higher-level people. Because they are higher-level people, we feel an obligation to look at them, and we do, and that is why sometimes it takes more time than you think it should.

Maybe we do move more slowly, but these are for the most part higher-level people, and we look at them closely. If, in looking at them closely, it results in slowing down an ultimate administrative sanction, I think that's just the price we pay.

Senator **Levin**. And my question, then?

Mr. **Keeney**. I am afraid I lost your question in the course of my dissertation—the Catch-22. Senator, I just——

Senator **Levin**. Three years in that McKean case.

Mr. **Keeney**. That's a long time. We looked at it thoroughly—he was a high-visibility public official.

Senator **Levin**. How do we get out of that Catch-22 situation where you say you want to look at cases where there is any evidence of criminal wrongdoing. In one hundred fourteen out of one hundred twenty-four, the IGs have said there is evidence of criminal wrongdoing. Your rate of prosecution is very low, but let's just talk about the high-visibility cases. Those are just a few. At the end of a year or two years or whatever it is—almost three years in McKean—there is a decision not to indict. Fair enough—if that is your decision, so be it. One of the reasons for the decision is the availability of an administrative remedy—which was available two years earlier, by the way, and which has been held up pending your investigation, and which you use as one of the reasons not to prosecute. Then the administrative remedy is either old or, in some cases, the fact that you don't indict is used as a reason not to proceed administrative.

There has got to be a way out of that. Otherwise, you have got these ethics cases in a box.

Mr. **Keeney**. Senator, if we didn't investigate the McKean case and similar cases to the extent that we did, you would very properly have me up here and explain why we didn't investigate it.

We did it; we concluded that we couldn't successfully prosecute. It took us a little while to do that. But that is only in a very limited number of cases——

Senator LEVIN. I want to focus on that limited number of cases. Those are, as you point out, very high-level officials. So you apparently take a pretty good look at those cases.

Mr. KEENEY. Yes, sir—if they warrant it.

Senator LEVIN. Well, of course.

Mr. KEENEY. We get some things with respect to high-level officials, and we just read the allegation and what is presented, and we reject it out-of-hand.

Senator LEVIN. I understand. It puts us in a box. It means there has been a delay in the administrative investigation now, in some cases, for a couple years. This is the box. You take a long time to look at these cases. They are high-level. You want the administrative proceeding to be held off. This is the box we are in.

I am asking you for some constructive suggestions.

Mr. KEENEY. But Senator, all I am trying to say is that the box is much smaller than you are suggesting.

Senator LEVIN. Fine. Let's take that smaller box, the high-level officials box—it is a smaller number, but an important number. Just give us some constructive suggestions.

For instance, is there any reason why the administrative proceeding should not continue but not necessarily be announced, providing that administrative proceeding doesn't interfere with your investigation?

Mr. KEENEY. Well, you put your finger right on it there. Normally, an administrative proceeding where there is discovery and notice to the subject of the investigation does interfere with our investigation. In those limited cases—and they come up occasionally—where we conclude that a parallel administrative investigation would not interfere with our criminal investigation, we tell them to go ahead. We do it occasionally, but it is a case-by-case thing.

Senator LEVIN. All right. So there should not be an automatic holding back on the administrative proceeding; it ought to be done on a case-by-case basis?

Mr. KEENEY. Well, I think my statement reflects that; if it doesn't, it should. It is done on a case-by-case basis, Senator.

Senator STEVENS. Would the Senator yield right there?

Senator LEVIN. Yes, sure.

Mr. KEENEY. Certainly, if they ask, if they consult with us, we will do an analysis and make adjustments.

Senator LEVIN. Just so we are real clear on this—and by the way, where the administrative investigation interferes with the criminal investigation, I'm for holding back on it. I have no problem with that. But I don't think we ought to do that automatically, as I think we do sometimes. It is assumed sometimes.

Mr. KEENEY. Well, if we do, we are wrong, Senator, and we will correct it; but I don't think we do.

Senator LEVIN. All right.

Senator STEVENS. Mr. Chairman, we face the same problem in connection with Congressional hearings, and I must say, by this Committee, too. We at times have been asked by Justice not to proceed with a hearing, and we have continued with them on a legislative basis despite the plea of the Justice Department.

Mr. KEENEY. Yes, sir. Sometimes you do, sometimes you don't, Senator. You make your own judgment as to——

Senator STEVENS. And I think sometimes, we have been wrong. But also, as a former Chairman of the Ethics Committee of the United States Senate, I can tell you your statistics are about the same as you would find during the time when I was Chairman of the Ethics Committee. We encourage people to refer to us potential assertions of violations of the ethics rules by Senators or their staffs. But I don't think we came out with public announcements of our actions concerning those matters, except on rare occasions. We tried to work out a standard of conduct and to guide the Senate so it would not violate the law or not violate the ethics rules.

But we have a similar rule, or similar way of managing our Ethics Committee procedures, and that is to encourage people to send to us comments that would indicate either staff or Senators were violating either the law or our ethics regulations in the Senate. And I think this Senator would agree.

The statistics in the GAO report on your referral of conflict of interest allegations were about the same kind of statistics you'd get out of the Ethics Committee of the Senate.

Senator LEVIN. I don't know if your reference is to cases being referred to the Ethics Committee where the person referring it is a high-level person such as an Inspector General who believes there is evidence of a crime. That is what this report indicates. I don't know whether that is your reference to the Ethics Committee or not.

Senator STEVENS. Well, the majority of them, as I recall—I can check with Mr. Canfield; he was there on the Ethics Committee when I was there—came from former opponents of Senators, their opponents raising issues of the ethics of the successful Senator.

Senator LEVIN. That is a very different context.

Senator STEVENS. That is a similar kind of thing that comes out of the administrative process.

Senator LEVIN. No, no. I am not talking about someone's opponent. I am talking about the Inspector General of an agency. These are references by the Inspector General of an agency. That is very different from someone's opponent making a complaint against him.

Senator STEVENS. Well, that's a matter of judgment. I think that most of the Inspector General cases involve references from another person within that agency to the Inspector General, which he has investigated, and he sends it to Justice if he thinks there is anything criminal in it—as he should. I don't argue with these statistics at all.

I am arguing with your conclusion——

Senator LEVIN. Well, it's not mine. It is the GAO conclusion.

Senator STEVENS. No, GAO didn't make any conclusion. It just said that in terms of statistics, one hundred fourteen were sent with the belief that there was something criminal; two of them so far have been prosecuted, and thirteen pending.

Senator LEVIN. No. My understanding of this report is—and we can get the GAO up here—is that this is where the Inspector General believes there is evidence of a crime, not where he is just simply forwarding an allegation of a third party.

Senator STEVENS. Well, I don't argue with that. They believed there could be evidence of a crime.

Senator LEVIN. I am differentiating that from someone's opponent who is just sending in a complaint in the middle of an election campaign. That's got a much higher level of credibility, it seems to me, than does a claim by somebody's opponent in the middle of or right after an election campaign.

Do you believe that the Office of Government Ethics should be informed of all referrals of suspected conflict-of-interest violations?

Mr. KEENEY. Well, I'm not sure that—maybe you have something particular in mind—I don't know of anything particular to be served by that. We have an agreement that once we review and decide not to proceed criminally on an ethics violation that we apprise not only the agency but the Office of Government Ethics.

Advance notice when we receive it, I'm not so sure it would serve a useful purpose, Mr. Chairman.

Senator LEVIN. The purpose would be that the Office of Government Ethics is given the responsibility under the statute of overall direction in the conflict-of-interest area, and it would help them if they knew of referrals to you by IGs, for instance.

Mr. KEENEY. Well, they know at a certain point; whether at an earlier point it would serve some useful purpose, maybe Mr. Nebeker would have some view on it. I don't know.

Senator LEVIN. You are saying, then, that after you close the case, for instance, you decline to prosecute, then you inform the OGE?

Mr. KEENEY. Then we have a practice which we instituted maybe two years ago at the request of the Deputy to Mr. Martin that they be advised. I hope it is being carried through on, Senator, because I personally was involved in setting up the procedure.

Senator LEVIN. Just so we are clear on that, the procedure that you believe is being followed or should be followed is that the OGE would be advised after you decide whether or not to prosecute—either way—of the fact that you——

Mr. KEENEY. If we decline—the agreement was that if we decline to prosecute, we would advise the Office of Government Ethics.

Senator LEVIN. All right. And if you do prosecute, they would obviously have noticed another way.

Mr. KEENEY. Yes.

Senator LEVIN. The Act says that the Attorney General, with the assistance of the OGE Director, should evaluate the effectiveness of the conflict of interest laws and recommend appropriate amendments. I am wondering if you have made such recommendation?

Mr. KEENEY. Well, we have previously taken the position that certain of the statutes should be expanded to include other branches of Government. But basically, for what they purport to cover, we think the existing statutes are adequate.

Senator LEVIN. So that with that one exception about covering Members of Congress, there have been no other amendments that you have proposed to the Congress?

Mr. KEENEY. The other thing we would like to have in here, Senator, is a misdemeanor provision, so that the nonwillful, knowing violations could be prosecuted as misdemeanors.

In some situations, we might be able to successfully prosecute as a misdemeanor what we don't reasonably anticipate we could prosecute as a felony. That would be helpful—not imperative—but it would be helpful, just giving us alternatives.

It is for the same reason that we usually advocate the availability of civil remedies. The more remedies they have, the more effectively you can enforce.

Senator LEVIN. Senator Stevens?

Senator STEVENS. I have no further questions. Thank you.

Senator LEVIN. Thank you very much.

Mr. KEENEY. Thank you, Senator.

Senator LEVIN. Finally, we have a panel made up of Michael Josephson, who is President of the Josephson Institute for the Advancement of Ethics; Marshall Breger, Chairman of the Administrative Conference of the United States; and Dr. James Carroll, who is a Senior Staff Member of the Brookings Institution, Center for Public Policy Education, and he is accompanied by Dr. Robert Roberts, who is an Assistant Professor of Political Science at James Madison University.

I think we'll use the order that is here, I presume. There may be some reason for it, or maybe not, but in any event, we'll call on Michael Josephson first, who is the President of the Josephson Institute for the Advancement of Ethics.

Mr. Josephson?

TESTIMONY OF MICHAEL JOSEPHSON, PRESIDENT, JOSEPHSON INSTITUTE FOR THE ADVANCEMENT OF ETHICS

Mr. JOSEPHSON. Thank you very much.

I have been asked to testify today on the current status of ethics in Government and how ethical behavior by public servants may be encouraged. I am honored and grateful for the opportunity to do that, and I have submitted more extensive written statements,[5] and I will just try to summarize in roughly ten minutes the essence of that statement.

Senator LEVIN. We would appreciate all of you, as a matter of fact, if you can, keeping your testimony down to seven or eight minutes, so we will have time for questions, because we have got to end right at twelve-thirty.

Mr. JOSEPHSON. I will try to talk faster rather than say less, then. Thank you.

Senator LEVIN. Thank you so much.

Mr. JOSEPHSON. It seems apparent to me that this Committee has to evaluate the effectiveness of the Government ethics law on the basis of the experience of the last ten years, also the present reputation of the Office of Government Ethics, and the quality of ethics in society.

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[5] See p. 167.

In making that evaluation, it is important to examine the systemic causes of negative public perceptions, low moral morale, and a seemingly unceasing parade of misconduct.

I sincerely congratulate the Subcommittee for being willing to look at this problem more broadly and look at some of these causes, because without such an inquiry, the problem cannot effectively be addressed.

Ethical problems in Government are pervasive, and they are important. They cannot be solved simply be statutory attempts to coerce public employees to virtue by forbidding a narrow spectrum of wrongdoing.

I am not suggesting that laws are inappropriate or useless. To the contrary, we need to establish enforceable, minimal standards of behavior for those who lack the sensitivity, judgment, self-restraint or moral fiber to avoid behavior which compromises the integrity of the Government. Well-drafted laws can prevent excesses and deter corrupt and otherwise improper practices.

I am suggesting, however, that such laws should only be part of a broader effort to create an environment, an ethical culture, which fosters genuine commitment to ethics and encourages persons in authority to make more ethical decisions more often.

As for the current state of Government ethics, I am sure I bring you no news when I tell you that by any measure—public confidence, employee morale, and the number of highly-publicized instances of impropriety—the picture is distressing.

Whenever I speak to groups outside of Government and mention my organizations' interest in Government ethics, I inevitably get snickers and the stale remark that Government ethics is an oxymoron, like jumbo shrimp.

Cynicism is rampant and growing, and unfortunately, it is a major part of the problem. In a democratic system, it is absolutely essential that we have trust for Government; but, each new revelation of impropriety feeds public cynicism and erodes that trust. As Lily Tomlin said, "No matter how cynical I get, I just can't keep up."

While the scandal bias of the media may give a distorted perspective as to the amount of impropriety in Government, it is not the aggressive exposure of ethically dubious conduct of public officials that worries me. That is, I think, a reasonable price to pay for the watch dog function of a free press.

What worries me is the possibility that soon improper conduct in Government will not be worthy of front page coverage or a half-hour on "Nightline." What worries me is that unless the momentum is reversed, dishonesty, abusive influence, and disregard for fundamental processes of democracy will invoke a ho-hum, so what, reaction. It worries me that we may lose our righteous indignation.

Now, from the public's point of view, there is no general perception of widespread corruption or venality among rank and file civil servants. By and large, it is not the foot soldier that gives Government a bad name. It is a small minority of highly-visible ranking officers who, through insensitivity, greed, or ideological self-righteousness, seem to mock and abuse fundamental concepts of democracy and fair play.

This is not a partisan observation. It is my personal opinion that ethics has no political party and neither the Democrats nor Republicans have been able to avoid the taint of impropriety.

From the point of view of career public employees, the problem is not the improper use of telephones or the acceptance of free lunches and gifts—most of the things that the Government Ethics Act focuses on.

Instead, it is the fact that politics too often dominates principle. It is the fact that both Executive and Legislative staffers are constantly put in difficult ethical positions by politically-driven supervisors or meddling legislators seeking to advance personal agenda or narrow private interests, rather than the common good.

Thus, in terms of the most important problems of Government ethics, current laws and the way they have been enforced have simply trivialized, sometimes politicized, and often bureaucratized, ethics.

A common fallacy especially prevalent in some Government circles is that if it is legal, it is ethical. This fallacy allows a person charged but not convicted, or who is found not to be indictable, to believe that they have been morally vindicated.

Laws can only establish minimal standards of consensus impropriety. Persons are not ethical simply because they don't act illegally. One can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law.

Ethical persons use an informed, sensitive conscience—not laws—to guide their conduct. They do not walk the line of propriety; they often do more than they have to and less than they are allowed to do.

As you review the current laws, perhaps you can consider the following specific suggestions.

First, I suggest you don't call the rules "ethics laws" and the ethics administrative agency the "Office of Government Ethics" unless the laws are made broader, more aspirational and address the affirmative dimension of ethics.

Second, I suggest that you be certain that the body of the laws you pass is pervaded by the spirit of public trust and the need for Government employees to avoid even the appearance of impropriety.

Third, make the laws fair by applying them to persons in the Legislative Branch as well as the Executive Branch. The moral authority of the rules is denigrated and undermined by the apparent hypocrisy of exempting lawmakers and their staffs from minimal standards of conduct.

Fourth, make the laws more effective by providing structures, resources and incentives for effective enforcement. Wherever possible, make them two-sided by imposing obligations on both sides of improper transactions. For example, in post-employment lobbying situations, you can impose an obligation of reporting on persons who are lobbyed, since they have less of an incentive to push the line of propriety. You might also impose time limits on enforcement. As Senator Levin mentioned earlier, long delay often makes the whole appearance of the ethical process look bad. There must be a way of handling ethical changes as priority matters.

Fifth, the laws should be more practical and realistic and reasonable so they are worthy of respect by avoiding overly-strict and petty rules, even if it requires cutting employees a little slack. For instance, the rule that absolutely forbids the use of Government telephones is not realistic and therefore is regularly violated.

Sixth, make the laws less complex and more sensible by avoiding legalistic complexities like the present compartmentalization scheme.

Seventh, make the laws part of a comprehensive positive program to instill, inspire and support an ethical environment, including efforts to increase ethical consciousness, commitment and competencies.

The last point brings me to the final issue of ethical decisionmaking and training, and the use of inspiration, collaboration, education and integration to advance a positive ethical tone in Government.

It is important to take a positive approach—not the "How to Avoid Getting in Trouble," orientation of the present manual of the Office of Government Ethics.

It is possible and important to instill an organizational culture and pride that supports rather than disputes high standards of conduct.

There is insufficient time to fully outline how I would suggest doing that, although I have done so in my written statement. I do want to emphasize, however, that both educational research and my own recent experiences with high-level Government employees strongly demonstrates that programs emphasizing ethics in decisionmaking can in fact change behavior. In addition, the success of such programs can be virtually assured if there is visible and sincere support from both Executive and Legislative leaders.

There are many ways to approach this problem. I hope Congress will encourage innovation and experimentation by funding pilot programs in a number of agencies.

I have just come from two days working with lawyers and judges, redrafting the new Code of Judicial Ethics, and I have seen how easy it is to take ethical principles and ideals and have them subverted into legal wrangling. I understand that ethics is easier said than done, and I understand the power and prevalence of less than noble forces that drive day-to-day decisions.

Nevertheless, I am not so cynical or sophisticated that I am not in awe at the enormous power of this body to make ideals realities. You are engaged in a worthy endeavor, and I wish you well.

Senator Levin. Thank you very much, Mr. Josephson.

Mr. Breger, we welcome you.

TESTIMONY OF MARSHALL J. BREGER, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY JEFFREY LUBBERS, DIRECTOR OF RESEARCH

Mr. Breger. Thank you very much, Mr. Chairman.

I am accompanied by Jeffrey Lubbers, our Director of Research, and I would ask in the interest of time that my written statement be placed in the record.[6]

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[6] See p. 192.

Senator **Levin**. It will be made a part of the record, and we would appreciate your being as brief as you can, so we have at least a few minutes for questions.

Mr. **Breger**. I will attempt to do so.

Let me say first that there has been tremendous progress in the ethics area. You have to remember that in the early 1960's, the debate was whether there should be a regulatory scheme at all, or whether you should rely on the criminal law. In 1978, a scheme was accepted, with a fight in Congress over whether disclosure should be private only, or public as well.

Today, we accept the need of a regulatory scheme, and the issues, I think, are how to improve that scheme and better manage it.

At the Administrative Conference, we have been involved very heavily in studying the Ethics in Government Act and the conflict-of-interest regulatory scheme. We have a full-scale study, the report of which will be due, unfortunately, in terms of this Committee, in November.

A special Conference committee with Fred Fielding, Lloyd Cutler, Allan Morrison, Phil Truluck of the Heritage Foundation, Phil Bobbit of the Texas Law School as members, are trying to look at this area in a nonpartisan way.

We have a number of short-term issues that we are looking at because we think they are very important for the transition to a new Administration.

First, we think it is important to look at conflict-of-interest rules for transition teams for the next Administration. This area has not yet been considered, and you may want to look at it in your legislation.

We also are refining Lloyd Cutler's suggestion about a rollover of tax when the taxable event is caused by conflict-of-interest requirements, and we will have proposed statutory language available shortly in this area. And we are also considering the wisdom of allowing in certain cases the use of diversified mutual funds instead of a blind trust when some kind of blinding requirement is necessary to comply with conflict-of-interest rules.

Our investigation so far into the Ethics in Government Act makes a number of points clear. First, on penalties, the criminal penalties just aren't working; let's admit that. You are dealing with the far-out case, once in a blue moon where they are imposed. Therefore, you have to beef up the civil penalties scheme. First of all, for post-employment conduct, you have to create civil penalties. Present law doesn't allow for that. The Administrative Conference suggested that in 1979, and we think that is still a wise way to go.

You have to consider the wisdom of establishing an administrative scheme for civil penalties that is more substantial than presently exists.

With regard to disclosure, I think it is important that we seek out less complexity. I am not certain whether the present requirement of zero to 1,000, 1,000 to 10,000, 10,000 to 100,000, and 100,000 to 250,000 really helps keep people ethical, helps the public understand where improprieties may exist, and it certainly confuses—as someone who has to fill it out every year—the person who has the responsibility of filling out the Form 278.

We think that in this matter you would get better enforcement if you look for less complexity.

Finally, since this is an invitation to discuss how to improve the ethical situation in the broad scope, I would like to bring one problem to your attention which I think might be solvable by administrative action by the Senate itself.

There is a real problem with the fact that Senate Committees require different disclosure of information in its confirmation process. In the Presidential Appointees' Handbook prepared by the National Academy of Public Administration, they review the different requirements and different questionnaires of each Committee. These differences lead to great confusion and delay; and when there is confusion and delay, there is a greater opportunity for slippage, for people not putting things down, for problems developing.

We understand that different Committees focus on different areas—the Banking Committee, for example, might be interested in different matters of disclosure than the Foreign Affairs Committee. But we think it would be very helpful if the Committee Chairmen got together and created a single supplemental disclosure form that would be in addition to the form which the Administration requires that an applicant fill out. Such an act would save considerable time and reduce the complexity of the confirmation process, while helping to maintain proper disclosure requirements.

I will conclude these remarks and be available to answer any questions you might have.

Senator LEVIN. Thank you very much, Mr. Breger.

Finally, we will call on Dr. James Carroll, of The Brookings Institution.

TESTIMONY OF JAMES D. CARROLL, PH.D., SENIOR STAFF MEMBER, THE BROOKINGS INSTITUTION, CENTER FOR PUBLIC POLICY EDUCATION, ACCOMPANIED BY ROBERT N. ROBERTS, PH.D., ASSISTANT PROFESSOR OF POLITICAL SCIENCE, JAMES MADISON UNIVERSITY [7]

Dr. CARROLL. Yes, Mr. Chairman. Right at the time, I'll pass here. My colleague, Robert Roberts, may want to say a word or two about the notion of an independent commission.

Dr. Roberts?

Senator LEVIN. Dr. Roberts?

Dr. ROBERTS. We have a number of recommendations in the paper we submitted, the most important of which is the establishment of an independent public integrity commission.

The reason we have made this recommendation is that the Catch-22 situation which plagues ethics administration has to be dealt with.

In 1962, when Congress codified the existing conflict-of-interest laws, the Kennedy Administration stressed to Congress that it would aggressively enforce the administrative sanctions. President Johnson in 1965 issued Executive Order 11222, which carried forward this principle.

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[7] See p. 203 for the prepared statement of Dr. Carroll and Dr. Roberts.

Congress accepted the principle that there would be vigorous administrative enforcement when they accepted the codification. There hasn't been.

Right now, we have two systems. They do not work well together. It results in a situation where someone is cleared of criminal wrongdoing, and nothing happens. That situation is intolerable.

Senator LEVIN. Well, let me start just with that last point. Have you looked at the policy of the Justice Department in terms of stopping administrative proceedings while their criminal investigation continues? Is that a case-by-case approach now, or is it fairly automatic that administrative proceedings are placed on hold while the Justice Department investigation is ongoing?

Dr. ROBERTS. That is the traditional way they have handled it, and it has been explained to me that——

Senator LEVIN. Which is the traditional way?

Dr. ROBERTS. The traditional way that they put on hold the administrative action, on the theory that if you conduct your investigation administratively, you may prejudice the case. So that is a traditional way of handling it.

Senator LEVIN. And there are situations where it might, of course. But we just had a witness from the Justice Department who says it is not an assumed policy; it is a case-by-case policy. And you are saying as far as you know, it is assumed that the administrative procedure would be placed on hold, that that is the routine?

Dr. ROBERTS. That's the practice—not that it is written down anywhere. That is the practice that has gone on, in a sense, through—it is not anything new. It has been the practice back through the Sixties.

Senator LEVIN. I'm not saying it is anything new. The question is whether it is the practice, and if so, how do we modify that practice. I gather you don't like the practice.

Dr. ROBERTS. I don't like the practice because it is creating the appearance that if you are not found guilty of a criminal matter, nothing is done. We are giving people clean bills of health solely on the basis of a criminal matter. And more important than that, civilian employees, career employees, are being prosecuted or being sanctioned under these standards of conduct. The political appointees are not. That creates this dual standard, which makes it very difficult for agencies to enforce the standards of conduct against their career employees.

Senator LEVIN. A couple other questions while we are addressing questions to the two of you. I believe, Dr. Carroll, in your testimony, that you—and perhaps Dr. Roberts, both—are recommending that the Office of Government Ethics be abolished and that a Commission on Government Integrity and Ethics be established.

Now, what would that Commission do that an improved Office of Government Ethics could not do—and when I say "improved," I am including making the Office of Government Ethics an independent agency, improving and upgrading the status of the Director, and clarifying its powers.

Dr. CARROLL. If the Office of Ethics were an independent agency, then with a little change in that so-called "corrective action" provision, a little amplification, you would probably get the same results.

Robert may have some additional thoughts on that.

Dr. ROBERTS. I think the primary advantage of the Commission would be the appearance that it is beyond manipulation, it is beyond coercion, it is truly independent. And more important than just deciding whether someone is guilty of a criminal violation, the Commission could, at the same time they may clear someone of a criminal allegation or the investigation, might issue a report dealing with the standards of conduct. So both investigations would be conducted simultaneously, not independently.

Dr. CARROLL. Mr. Chairman, I do think it is very difficult for the head of OPM to be truly "independent." You know as well as I, the theory of OPM was that it would be an agent for the President, at least to some degree, and I think it puts these people in a very difficult position. That is why we stress the concept of independent.

Senator LEVIN. So I gather than you are supporting making OGE an independent agency, from your last comment.

Dr. CARROLL. Yes, sir.

Senator LEVIN. That would avoid the problem which you just described.

Dr. CARROLL. Yes.

Senator LEVIN. Another recommendation that you make is that the civil penalties be substituted, is your words, for criminal penalties. I am wondering whether or not criminal penalties should not be retained for the more egregious cases, but that we add the civil penalties to it?

Dr. CARROLL. I would say "supplement" instead of "substitute." There might be a few cases—but Robert, do you have a comment?

Dr. ROBERTS. I think when we look at the 1962 codification, it is important to understand that those are fairly narrow statutes. I personally don't believe they are that difficult to understand and that difficult to apply. I think Congress did a fairly good job with a few minor corrections. They are minimum. They weren't meant to be all-inclusive.

Congress was very conscious of what they were doing in terms of being careful to narrow those. If you add civil sanctions, it would provide additional discretion to, let us say, Justice or an independent commission, but I really wouldn't do away with the criminal sanctions——

Senator LEVIN. You would not?

Dr. ROBERTS. I would not.

Senator LEVIN. You would say "supplement" instead of "substitute"?

Dr. ROBERTS. I say "supplement" instead of "substitute."

Senator LEVIN. I thought that your testimony used the word "substitute".

Dr. CARROLL. It did, and I think that is a mistake and should be corrected.

Senator LEVIN. Thank you.

Let me turn it over to Senator Stevens.

Senator STEVENS. No; go right ahead.

Senator LEVIN. Mr. Breger, I believe that the Administrative Conference is doing some studying on whether or not the ethics laws hinder high-level executive recruiting. I am wondering if you have any empirical evidence yet, one way or another on that issue, that you could share with us today? Are those results in yet?

Mr. BREGER. Unfortunately, they are not. We only have a great deal of anecdotal evidence. It is a complicated problem and one of sociological research design, and we don't yet have the evidence in.

Senator LEVIN. What kind of timetable do you have for that study's completion? Is there a fixed timetable?

Mr. BREGER. We hope to have the study by Labor Day.

Senator LEVIN. Okay. And you had, as I understand it, a working conference on the issue of ethics in Government.

Mr. BREGER. Yes, sir.

Senator LEVIN. Was there any real consensus at that conference on any of the issues discussed?

Mr. BREGER. I believe there was consensus in a number of areas. I should for the record say that there was no consensus on Senator Thurmond's bill. But as to the question of the complexity of the present disclosure provisions, I think there was consensus that that was the case, that there is far too much complexity. The need for civil penalties to be added in the post-employment area was, I believe, a consensus.

We have a transcript which we will make available to you, if you wish to have someone on your staff review that.

Senator LEVIN. All right.

Mr. BREGER. I might add, if I can, the matter of allowing where possible a diversified mutual fund instead of a blind trust, which would save a great deal of complexity for people, was also a consensus item.

Senator STEVEN. Would you give us two copies of that so we can each review it?

Mr. BREGER. Certainly.

Senator LEVIN. Are there any specific suggestions for strengthening, toughening the ethics laws that you have come up with, that you would characterize as toughening or strengthening?

Mr. BREGER. If I may be forgiven, I believe that changes that lead to better enforcement are toughening. And I think that reducing the complexity of the disclosure provisions will in fact strengthen the laws because they will lead to better enforcement of the laws. I also believe that making civil penalties the primary enforcement tool will strengthen the laws, because the criminal penalties aren't being used now.

Senator LEVIN. Do you have a position on including Members of Congress in the post-employment situation?

Mr. BREGER. The Conference has no formal position on that, but I think certainly the discussion at the working group was clearly in that direction.

Senator LEVIN. And what about elimination or reduction of compartmentalization?

Mr. BREGER. We have no position on that. We are awaiting the full report.

Senator LEVIN. And what about the prohibition of Government-wide contacts for a year by those high-level Executive office officials?

Mr. BREGER. I think we are awaiting the full report on that.

Senator LEVIN. The report of whom?

Mr. **Lubbers**. I think the question there is where you draw the line. I think there is general agreement that the high-level officials should have to wait a year, but the question is how far down——

Senator **Levin**. No, I'm not talking about where you draw the line. I'm talking about how wide inside the Government the prohibition applies; that it be Government-wide instead of agency-wide for certain high-level officials in the White House.

Do you have a position on that?

Mr. **Breger**. Not as yet. We are awaiting the full report of our special committee.

Senator **Levin**. Thank you.

Then, finally, Mr. Josephson, just one question to you about the efforts of your Institute, on which we commend you, by the way, very highly. You are trying to teach ethical decisionmaking and not just what restrictions are on your activity, and you have commented already on the title of that booklet which was put out by the Office of Government Ethics.

Some people think that a person's ethical behavior is pretty much set by the time they enter their careers. What is your comment on that?

Mr. **Josephson**. Well, we did a lot of research on that, and a lot had been done—actually, we just researched the research. And it is absolutely clear that that is not the case.

In fact, operational ethics are not generally formed until the ages of 23 to 30; and the reason for that is people hold all kinds of values that are often inconsistent, but until they have to make life decisions of significance, they don't shuffle or prioritize those values.

As a result, we find that employers have a lot of influence on the way people make decisions.

It is important to recognize that even though values don't always change as we grow, our decisions change because we give different weight to values.

And what we think the Institute has been successful with is the programs we have run because we try to get people too be more sensitive. In very complex situations, they should look at a broader range of ethical issues and implications. Such programs do affect future decisions.

A follow-up study we did with the senior staff of the U.S. Senate, as a matter of fact, showed that close to one-third said they made different decisions as a result of the program—and that doesn't mean they were unethical before.

Senator **Levin**. Given particularly what you have just said, then, about ethics are not totally formulated by the time you enter your career—in fact, quite the opposite, according to your conclusion—how important, then, is management tone?

Mr. **Josephson**. Absolutely essential—and you will forgive me. I am a lawyer. I have been a law professor for 20 years, and I am very cynical about the law as a mechanism to modify behavior, except by coercion. I had my own business before I did this, and I determined the tone of that business, and what I decided to do as a CEO had enormous impact.

If the individual agencies, from the Executive on down would emphasize ethics as something that is important, people could have a sense of pride about ethics instead of resistance to it. And my experience is that people want to respond to that. But they will follow the tone of the office. They will do whatever it takes to succeed, generally speaking, in whatever organizational setting they are in.

Senator LEVIN. Senator Stevens?

Senator STEVENS. I agree with you, Mr. Josephson. Do you provide through your foundation for "indoctrination"-type courses for new employees of Congress, the Senate, the House, that sort of thing?

Mr. JOSEPHSON. Well, we'd like to do that. We have been running programs now primarily for senior staff members of Congress, and we are doing some things on the State levels, as well. But we have started a new Government Ethics Center that has had exactly those goals.

Senator STEVENS. Well, I hope you pursue that. My judgment is the same as yours, but I think it goes further than that; I think it goes to the whole concept of the breakdown of the American family and some of the traditions that came out of our original lifestyle of nonworking mothers where one parent was in the house all the time, and a great deal more connection with community and church and school. Small towns still seem to have a higher standard in terms of the ethical standard than, say, the major cities, in my judgment. It is something that we really ought to look at to find out how can we give the best guidance possible particularly to younger people.

I should think that the private industry area should also be interested in your approach. I am appalled at times when I see that some people we have known and associated with find themselves in a position where they have just literally gone against what we would assume to be a common understanding of ethics—people in various industries, some in Government, others, even judges that we have had occasion to deal with via impeachment here in the Senate. It seems to me that there is something there that can be done to try and re-inject the idea of how do we set forth the standards that we expect.

We have tried to do that, as I indicated, with the Senate Ethics Committee. We have a standard reference that if any Senate staff or any Senator has a question at all before they do something, we have encouraged them to come and seek advice as to what is the standard, what are the precedents, how have these things been read out in the past, how will they be read out in the future as far as ethical conduct. And we have been criticized here in the Senate for having done that, but I think it is the best way to do it. A preventive approach is a lot better than the enforcement via criminal laws or Senate sanctions.

Mr. JOSEPHSON. One of the things I want to stress is we have experienced the fact that if you are concerned with actually changing behavior, you don't do that by sermonizing or moralizing; nobody likes to be "should upon."

Instead, what you have to do is get them to be in touch with the values that they have so they can see how their decisions relate to those valves. Every organization we work with persons in politics, journalists, business executives have their own excuses, their own insider excuses.

In politics, it is the end justifies the means. It is so task-oriented that, very often, very ethical people who are really willing to do the right thing lose sight of what the right thing is because they are so concerned with the day-to-day performance of a particular task. We have had good experience in being able to pull people back a little bit and have them look at what they have done and what alternatives they have to do things in ways that are more consistent with their own values.

Senator STEVENS. Yes, but as you say, generally that has to come from the top.

Mr. JOSEPHSON. Absolutely.

Senator STEVENS. Generally, the standards of conduct are going to be established by the person, in the final analysis, who has to make the decisions.

Mr. JOSEPHSON. Otherwise it is wasted time.

Senator STEVENS. Well, I encourage you.

Gentlemen, I don't have any other questions, but I encourage you, and I think that many of us here would be delighted to work with you on your goals.

Mr. JOSEPHSON. Thank you.

Senator STEVENS. I think it is something that Brookings and others might explore as to how we might do more of that. Rather than having more emphasis on what is a violation and what should be the sanction for failure to live up to standards of conduct, we ought to have more information as to what is the standard of conduct that is expected, and how that applies to various circumstances as they arise in the course of employment.

Mr. JOSEPHSON. And it is important to remember—we title our magazine "Easier Said than Done," because it is important not to be sanctimonious. In real tough lifetime decisions, it is sometimes easier said than done, but it is important to do; and that is what needs to be stressed, and I agree with you totally, Senator.

Senator STEVENS. Yes, they are tough.

I thank you very much. And I congratulate you on what you are doing in your foundation. I know of your background and what you have done, and I think that your use of the good fortune you obtained in business through your ethics foundation is a very admirable one. I am very glad to see that happen.

Mr. JOSEPHSON. Thank you so much.

Senator LEVIN. We would be appreciative of that research you made reference to that shows that ethical attitudes are not formulated in concrete prior to the time someone begins a career.

Mr. JOSEPHSON. It is in the magazine. It is the first article, by James Rest, who is a well-known educational psychologist at the University of Minnesota.

Senator LEVIN. In terms of the research.

Mr. JOSEPHSON. Yes, he cites the research.

Senator LEVIN. That is value to us, because it does fit in again with this idea of tone-setting at the top. That is really critical, and many of us feel that is what has been missing.

Tomorrow, we will have another hearing, and we will get into more specifics tomorrow on the reauthorization of the Office of Government Ethics.

We greatly appreciate all of you coming forward today, and all your statements will be made a part of the record. Thanks for being so brief in your oral presentations.

We stand adjourned.

[Whereupon, at 12:26 p.m., the Subcommittee was adjourned to reconvene at the call of the Chair.]

REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

WEDNESDAY, APRIL 13, 1988

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:40 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Carl Levin, Chairman of the Subcommittee, presiding.

Present: Senators Levin, Cohen, and Heinz.

Staff present: Linda J. Gustitus, Staff Director and Chief Counsel; Curtis Copeland, Professional Staff Member; Mary Berry Gerwin, Minority Staff Director and Chief Counsel to the Minority; and Frankie de Vergie, Chief Clerk.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Good morning, everybody. The Subcommittee will come to order.

This is our second day of hearings on ethics in the Federal Government. Yesterday, we looked at the question in general, where we have come since the passage of the Ethics in Government Act of 1978. There seemed to be a consensus yesterday that achieving an ethical work force is in large part the responsibility of the management of that work force, the top-down attitude that establishes the priority for ethical conduct. Ethical behavior requires an inner sense of judgment and values. Sensitivity to that sense of judgment can be heightened or diminished depending upon the degree of interest shown by management.

We also learned yesterday that we have a difficult problem in our ethics enforcement, between the needs and demands of our criminal justice system and our need for timely and effective disciplinary administrative action.

We seem to be in a Catch-22 situation where administrative action in highly visible ethics cases is suspended pending the outcome of the Justice Department's criminal investigation. By the Justice Department's own admission, the investigation of these cases takes a long time and, at the end, according to a February 1988 GAO report, there is a 98 percent chance that there will be no criminal prosecution anyway. Yet any administrative proceeding will have been postponed, and by this time any administrative action is either too late, too little or ignored altogether.

Yesterday, we looked at the big picture. Today, we are looking at one title of the Ethics in Government Act, Title IV, which established the office of Government Ethics. OGE was created to provide "overall direction of Ethics in Government Act policies related to preventing conflicts of interest." Founded as an office within the Office of Personnel Management, OGE was initially authorized for five years.

In 1983, OGE was reauthorized for another five years. This last authorization expires on October 1st of this year. The purpose of this hearing is to review the work of this office in the context of what we learned yesterday in the reauthorization of the OGE.

OGE was given some unique and rather extraordinary responsibility. It reviews the financial disclosure statements of the President and every presidential appointee confirmed by the Senate to ensure that there are no conflicts of interest between their official duties and their private interests. It is supposed to render judgments on the propriety of actions taken by some of the most powerful public officials in the country. When those actions are questionable, OGE has the responsibility to stand up and say so. It reviews the ethics programs of individual agencies and, where necessary, directs them on how to improve their operations.

Despite some changes in 1983, OGE is still a sub-unit within OPM and, therefore, must submit all budget requests and public statements through them. Although the director was given a five-year term, he still serves at the pleasure of the President. Thus, this office, which certainly is one of the most sensitive jobs in Government, is not as independent as I believe it should be.

Another issue is the question of OGE's authority to order corrective action and the extent to which OGE should and could use this power. As Chairman of the Subcommittee, I have personally followed several key ethics cases through the Ethics in Government Act labyrinth of administrative action.

In each of those cases, when a position was finally taken by OGE and issued by means of a letter to the appropriate agency head or the President, OGE urged only that "appropriate action" be taken. OGE did not recommend disciplinary action in general, and certainly not with any specificity in those cases; nor did it explicitly make a finding as to whether or not a violation of the standards of conduct had occurred. Instead, in those cases we looked at, it fudged the finding and recommended appropriate action at the discretion of the agency head.

It may be that the statute needs further elaboration on what Congress intended when it gave OGE this authority. Are we asking OGE to resolve a conflict or appearance of a conflict of interest by ordering the employee himself or herself to take a specific action, such as divestiture or recusal? Or are we asking the OGE to punish the conduct; that is, ordering the agency to issue a reprimand or suspend the employee?

We know OGE's authority to enforce any corrective action, however it is defined, is limited. Does that establish a false expectation of the office? Maybe we should be clearer and give OGE the authority to make an official public finding on an allegation of ethical misconduct and a specific recommendation for agency action, and then leave to the agency the discretion to implement that recommendation and leave to OGE the power of publication to achieve that recommendation.

Information and suggestions we receive today and which we received yesterday will serve as the basis of the bill to reauthorize the OGE. We hope to introduce that bill by the end of next week and have it reported by the full Committee in early May.

The first witness today is the Honorable Frank Nebeker, who is director of the Office of Government Ethics. We have come to know you, Judge, well and to work with you, and we welcome that. We now welcome your testimony.

TESTIMONY OF FRANK Q. NEBEKER, DIRECTOR, OFFICE OF GOVERNMENT ETHICS,[1] ACCOMPANIED BY DONALD CAMPBELL, DEPUTY DIRECTOR, AND GARY DAVIS, CHIEF COUNSEL

Judge NEBEKER. Thank you, Mr. Chairman. May I ask your indulgence by having my top aides join me?

Senator LEVIN. Sure. Of course.

Judge NEBEKER. Thank you.

Before your statement this morning, Mr. Chairman, I felt somewhat like the lawyer who had an argument in the Court of Appeals but he was not yet informed as to what case it was he was to argue. But with your statement, I am more at ease with respect to what the issue is before you today.

It has been and remains my hope that reauthorization of the Office of Government Ethics will become a fact well before the October 1 deadline. I also understand a desire by many to change the organic act not only to alter the nature of the office, but also to clarify its authority and accommodate needed expansion. I underline the latter.

Indeed, action on amending certain criminal provisions seems imminent. While we welcome an opportunity to be heard on behalf of the office and the Executive Branch on many of the substantive proposals, it is my hope that reauthorization and needed increase in appropriations ceilings can be passed without causing undue haste on other issues.

I have submitted a statement, as the Chairman well knows, and answers to written questions. With those submitted for the record, I am prepared to attempt to answer questions, should the Chair have any.

Senator LEVIN. Thank you, Judge Nebeker. Your full statement and the other material that you mentioned will be made part of the record.

In 1983, the Congress gave OGE greater independence from the Office of Personnel Management by making OGE's budget a separate line item and by permitting OGE to act in consultation with rather than under the general supervision of OPM. Can you tell us what are the practical effects of OGE's current relationship with the OPM?

Judge NEBEKER. There have been, in my brief tenure—and I have been advised that there has been prior thereto—no attempts at command influence from OPM or, indeed, in my experience, from anybody else. There is necessarily built into the system of budgeting through OPM, and acquisitions through them of not only material but personnel, a delay that is quite frustrating. I cannot lay blame on anyone for it, but we do have that kind of a drag on the system as a result of that affiliation.

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[1] See p. 216 for Judge Nebeker's prepared statement.

Senator LEVIN. What role do they play in reviewing and commenting on your budget, on your congressional testimony, and on personnel matters? Other than the delay; we understand that question. But do they have any substantive role, comment in your proposed budget?

Judge NEBEKER. Yes.

Senator LEVIN. Your testimony in Congress?

Judge NEBEKER. Well, I think not really. That comes from OPM where it affects everyone's.

Senator LEVIN. OMB?

Judge NEBEKER. OMB where it affects everyone's testimony.

Senator LEVIN. So that you are dealt with relative to your congressional testimony the way all other agencies are? You submit it in advance, do you, to OMB?

Judge NEBEKER. That is correct.

Senator LEVIN. And how about your administrative matters or personnel matters? Go through that with us. What does OPM do relative to new hires? Do they give you recommendations? Do they comment on your proposed hires?

Judge NEBEKER. Yes. Your indulgence just a moment.

Senator LEVIN. Sure.

[Pause.]

Judge NEBEKER. Yes, I am reminded of a current difficulty that we have. It is not with professional staff. We are quite independent in that regard. But support staff we must and do go through OPM.

Senator LEVIN. Is that for recommendations, comment, approval? What is it?

Judge NEBEKER. I am speaking of personnel, hiring.

Senator LEVIN. That is what I mean. Do they make recommendations as to who you are going to hire? Do they comment on who you are going to hire, or is it just a formality, the paper goes through OPM?

Judge NEBEKER. Basically, it is just the formality of paperwork.

Senator LEVIN. So they have no input as to who you are going to hire, either professional or support staff?

Judge NEBEKER. No more than they would have with respect to any other Executive Branch agency. You know, one must take personnel off availability lists to ensure that there is equal treatment with respect to hiring. Qualifications have to meet certain standards that are preset, that sort of thing. But that is, I suppose, standard whether we are affiliated statutorily with the office or not.

Senator LEVIN. Now, going back to your testimony for a moment, just so that the record is clear on this, you indicated you submit your testimony to OMB, not to OPM; is that correct?

Judge NEBEKER. Yes.

Senator LEVIN. Now, do you believe that the Office of Government Ethics should be removed from the OPM and made a separate agency?

Judge NEBEKER. Yes.

Senator LEVIN. And should we go——

Judge NEBEKER. Your question is double-headed. I think from a logistical administrative standpoint, the office could function better if we were independent in the sense of numerous other agencies that operate under the auspices of GSA. We have inquired into that mechanism, and it seems to be an attractive one. By the same token, I am not complaining about the treatment, just the system as it exists today.

Senator LEVIN. And would you make the Office of Government Ethics an independent agency by making the director removable only for good cause?

Judge NEBEKER. Well, I am not in a position to respond to that for the administration. I can say I have been subjected to no command influence whatsoever. And from that standpoint, I feel quite free to act independently, as long as I feel I am acting responsibly.

Senator LEVIN. Well, is that a qualification on your feeling about your independence? You say you feel free to act independently so long as you are acting responsibly. I am not sure what that qualification means.

Judge NEBEKER. Well, I like to think I would act responsibly, so I guess the answer to the question is I feel quite independent.

Senator LEVIN. Do you think it would be better—I am asking for your personal opinion here now, not representing the administration. Indeed, this whole dichotomy and conversation may reflect the need for what I am suggesting. But do you think it would be better that the director be removable only for good cause, as a matter of form?

Judge NEBEKER. As a matter of form for the future, I think that would be appropriate, yes.

I hasten to add I am not advocating a change in the conditions under which I took the office. I took them under the conditions as you have announced them in your opening statement, and I am comfortable with that. But for successors, I would be inclined to suggest that a greater degree of appointment independence would be helpful.

Senator LEVIN. What kind of independence?

Judge NEBEKER. Appointment. Retention in office.

Senator LEVIN. Let us talk about the role of the OGE, Judge. Is it a counselor? Is it a cop? Is it both? Should it have that dual role? If so, to what degree? How do we mesh those functions? Can we have it both ways?

Judge NEBEKER. My experience and what I have been told in the last few months indicates that the office is a counselor, not a cop. Lines of communication are open and free. Agencies seek advice, want advice. There is a spirit of cooperation; there is an ethics mentality with the agencies. And if we were to become, as you put it, a cop, an enforcer, I suggest that that relationship would tend to dissipate very quickly.

Senator LEVIN. Where are we going to get enforcement?

Judge NEBEKER. Say that again?

Senator LEVIN. Where do we get administrative enforcement?

Judge NEBEKER. At the agency level.

Senator **Levin**. So they have got to be a cop and a counselor, do they not?

Judge **Nebeker**. Yes.

Senator **Levin**. So there is nothing inconsistent about some office being both a cop and a counselor. You would just move it over to the agency level.

Judge **Nebeker**. Well, that is probably where it is. As I envision it, we have plenty of mechanisms in place for administrative sanctions, imposition of administrative sanctions with respect to career Government employees.

When we are talking about the individuals you referred to as some of the most powerful Executive Branch people, the system I am not sure can be superimposed on them. They answer to the President of the United States whose obligation it is to faithfully execute the laws of the United States.

Whether an enforcement mechanism, including suspension, removal from office, could constitutionally be imposed without the concurrence of the President, I am not prepared to say. I think that it creates considerable constitutional questions.

Senator **Levin**. There is nothing unconstitutional about your ordering something, is there?

Judge **Nebeker**. About my ordering?

Senator **Levin**. Yes. If it is not enforceable and if the President refuses, there is nothing unconstitutional about your ordering it unless you sought to enforce it in a court.

Judge **Nebeker**. Well, I would have no authority to enforce it in court.

Senator **Levin**. But what is unconstitutional about you saying, I order you to do this? And the President says, you cannot order me to do a darn thing.

There is nothing unconstitutional about your authority to order something. It would only be unconstitutional if you sought—or might be unconstitutional, arguably—if you sought to enforce it without the approval of the President.

Judge **Nebeker**. That's the problem. Was it Kruschev who said, how many divisions has the Pope got?

Senator **Levin**. Well, I am not sure whether he said it or someone before him. In any event, somebody said that. That is a different issue.

How you enforce an order is one issue, it seems to me. There is another issue, though, as to whether there is anything unconstitutional about giving you the power to enter the order. It may not be wise. It may be unconstitutional if you sought to enforce it.

Judge **Nebeker**. It may be a moot exercise.

Senator **Levin**. It may be a moot exercise, but it is a pretty powerful statement. And I do not think it is moot at all. I think if the Office of Government Ethics says to somebody, I am now directing you to act; set aside the wisdom issue of this for a moment. Set aside whether you can enforce it.

It is a very powerful action on your part; I think you would agree to that; even if you have no enforcement power.

Judge **Nebeker**. I do agree. And indeed, that is the relationship today when we are counselling.

Senator **Levin**. But I want to get to the order issue.

Judge NEBEKER. Even with an order, I might add, Mr. Chairman.

Senator LEVIN. And by the way, the Pope may not have a lot of troops, but he has tremendous power, which comes through a moral position essentially that he has maintained.

It is very similar, in a sense, to what we expect of your office. I am not trying to analogize your office to the Pope.

Judge NEBEKER. I hope not.

Senator LEVIN. But anyway, in terms of having moral clout, a moral stick in your hand, it's got an awful big impact when it is used.

So I do not think we ought to worry technically about whether you could enforce an order constitutionally; I really do not think that is the issue.

The issue is whether you should have the power to order an action, whether or not it is enforceable; and secondly, if you should not have that power, how we should amend the statute to give you the kind of power you should have?

I think those are the issues, so I would rather kind of stick away from the constitutional issue.

Senator COHEN. You mean stay away.

Senator LEVIN. Yes, stay away from the constitutional—is that what I—stick away? Oh, yes, stay away. Senator Cohen has come just in time to rescue me from some of my grammatical flaws here.

Let us get to that language in the statute about giving you the authority to order agencies and employees to take corrective action when you deem it necessary.

Can you tell us how you interpret that authority?

Judge NEBEKER. I interpret it with trepidation. If you refer to Section 402[b][4], Title IV of the Act, there is language there, with respect to the review of financial statements, and it says that the responsibility of the director includes recommending appropriate action, "to correct any conflict of interest or ethical problems revealed" by a review of the financial statement.

There is one place, I'm not sure it's not overlooked often, where we also have corrective authority.

Of course the one you are referring to, in the main, is 402[b][9], which states that the director may order corrective action on the part of an individual.

Senator LEVIN. Or the agency?

Judge NEBEKER. The employee or the agency.

The only other place in the act where the phrase, on the part of, appears, is in 402[a]. And what it means, I am not sure.

Recourse to Webster's Dictionary would reveal that on the part of, as a clause, means on the side of, with regard to, or so far as concerns the one specified. Whether that definition means, in effect, a corrective order against an employee, I don't know.

I choose to deal at this point with the statutory phrase, on the part of an employee, because there seems to be no difficulty, at least due process wise, constitutionally that is, in issuing corrective orders on the part of an agency. That fits within the power of one office to, under the law, direct action by another office.

Where it comes to corrective action on the part of an employee, one for whom there is no mechanism, or disciplinary action or corrective action within the agency, I think one must recognize that the Constitution hasn't stopped at the threshold of the office each morning.

And thus, if the State, through the director of OGE, is to issue a corrective order carrying with it condemnatory findings, one must construe the statute somewhat strictly, but still, consistent with fundamental fairness as required by the due process clause.

That gets us to the question you broached in your opening statement this morning, as to whether the office should have fact-finding authority before it issues whatever order or publication that is seen fit to be issued.

And it is in that area that I am prepared to make recommendations for statutory change, not this morning; but I have drafted what I think would be workable material, and I must,first of all, share it with appropriate authorities.

Senator LEVIN. How quickly can you get that to us?

Judge NEBEKER. I've got it written. I can get it to the appropriate authorities within the executive branch today.

Senator COHEN. No, he said to us.

Judge NEBEKER. I don't know. I'm sure the matter would have to be referred to the Department of Justice and OMB, for their concurrence, or suggestions.

Senator LEVIN. As I indicate in the opening statement, I would hope that we could introduce a bill by the end of next week, in order to try to meet a timetable.

Can you shoot for that, to get that to us by the end of next week, with or without the comments of the Department of Justice?

Judge NEBEKER. That's a little dangerous, but I can shoot for that time.

Senator LEVIN. Is it dangerous, you mean, to commit yourself to get it to us without the comments of the Department of Justice, or is the timetable dangerous?

Judge NEBEKER. Dangerous for me to submit it to you without approval of other authorities.

Senator LEVIN. Well, that goes back to the first question about your independence.

Judge NEBEKER. Yes, it does—well, all right, I agree.

Senator LEVIN. A good reason for why we should not just make it prospective to new directors, but the current one.

But at any event, you know our timetable.

Judge NEBEKER. Yes.

Senator LEVIN. We would welcome your recommendations, obviously. And with or without the comments of the Department of Justice.

Judge NEBEKER. I appreciate that timetable. That will get this issue behind us, as it should be, prior to transition.

Senator LEVIN. Well, I have a number of questions that I want to pursue in this area of current statutory language, but I am going to alternate here.

Senator Cohen?

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Mr. Chairman, thank you. And I apologize for not being here at the opening of the hearing. I would like to introduce a statement in support of the reauthorization of the act.

[The statement of Senator Cohen follows:]

STATEMENT OF SENATOR COHEN

I am pleased that the subcommittee is holding hearings today on the reauthorization of the Office of Government Ethics. Since 1981, this subcommittee has devoted much time and effort to improving the ethics program governing the executive branch. Key to the successful administration of the ethics laws is, of course, the Office of Government Ethics, a very small office which is charged with the very large statutory mandate to oversee and coordinate the ethics program of the entire executive branch.

The Director of the OGE, as well as those agency officials—the so-called "DAEO"—who counsel officials and agency personnel on the day-to-day ethics decisions, hold very sensitive positions indeed. The Ethics Act requires the Director to provide "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." The statutory responsibilities of the Director require him to assume many roles including that of advisor to agency personnel, an interpreter of the ethics laws and regulations, as well as an enforcer and adjudicator when there has been a possible violation of the ethics laws or standards.

These are, no doubt, very difficult responsibilities that the Congress has thrust upon the Office of Government Ethics and its Director. They are also awesome responsibilities when one considers that the reputations of public servants can be irreparably sullied if this Office or its Director makes ethical judgments too hastily.

Today we will consider whether the Congress has given the Office of Government Ethics the adequate tools and structure to perform its tasks. We will consider whether the Office now has enough staff and resources to do its job, and especially whether it will be adequately equipped to handle the massive transition that will occur this November as the Reagan administration comes to a close. There will be hundreds of new officials coming into the new administration and the OGE will play a critical role in educating these officials about their financial disclosure and ethics requirements.

In addition to the question of resources and structure, we must probe whether the OGE has the will and the inclination to play an aggressive role in ethics education and enforcement. This office was created by the Congress to be an ethics watchdog, but, unfortunately, in the last few years it has been viewed by many as lacking the bark—let alone the bite—to ensure compliance with ethics standards and laws. I am hopeful that Judge Nebeker will bring new leadership and vitality to the OGE to make this Office more effective. Even beyond this leadership, however, we must probe whether statutory changes are necessary to make the OGE a stronger voice in ethics policies and enforcement.

Throughout these hearings there has been much testimony on the crisis that we are now facing in ethics in government. While I do believe that much more attention and emphasis must be placed on ethics from within the administration—and that a strong commitment to ethics must be made by any incoming administration—we would be wrong to characterize the entire executive branch as being fraught with ethics problems. The vast majority of civil servants and political appointees are ethically-minded, dedicated public servants. We must, however, ensure that a strong ethics program is in place to promote and enforce high standards of conduct. This is crucial to public confidence in government. The Office of Government Ethics plays a central role in this process and I strongly support its reauthorization.

Senator COHEN. Judge, I have been very impressed with the comments I've heard about your commitment to the office, and I think that Senator Levin and I both look forward to your leadership in this area.

Yesterday, Archibald Cox testified that the Office of Government Ethics has rarely dealt with ethical misconduct in political appointees.

Is that a fair statement in your judgment?

Judge **Nebeker**. Has rarely dealt with it, is the way he put it?

Senator **Cohen**. That is right.

Judge **Nebeker**. I was not here for his testimony, and I have not read it. Rarely dealt with it.

Senator **Cohen**. Let me pose it hypothetically. A witness hypothetically said that the office has rarely dealt with ethical misconduct on the part of political appointees. Would you agree with such a statement?

Judge **Nebeker**. I would not.

Senator **Cohen**. You think it is unfair?

Judge **Nebeker**. Well, I think it is incomplete. We probably have rarely dealt with it to his satisfaction.

Senator **Cohen**. Pardon?

Judge **Nebeker**. We probably have rarely dealt with those problems to his satisfaction. But heavens, we deal with it on a daily basis.

Senator **Cohen**. Would it be to your satisfaction that we have dealt with it?

Judge **Nebeker**. In the last four months, yes.

Senator **Cohen**. I missed your opening statement, but do you think the office now has adequate authority to resolve the ethical violations of political appointees?

Judge **Nebeker**. I think we have the—I didn't catch your question.

Senator **Cohen**. Adequate authority.

Judge **Nebeker**. To deal with the——

Senator **Cohen**. In other words, do you need more statutory authority, or do you need more will power?

Judge **Nebeker**. No, I think that to adequately deal with these problems, we need a capacity to do things that we simply do not have at the present time.

And I guess what we need is more express statutory authority to do it. I speak of fact finding authority.

Right now, to the extent that we have it, we have to make it out of whole cloth on implied power. And that's a little tenuous, particularly if you attempt to budget for it.

Senator **Cohen**. That would be one of your recommendations, I take it, then, to expressly authorize fact-finding investigations and power on the part of the office?

Judge **Nebeker**. Yes.

Senator **Cohen**. And that is one that you will be making to the Administration to be cleared by OMB and the Justice Department?

Judge **Nebeker**. Yes, on page 2 of my answers to the questions from both of you, I have dealt with the five or six areas that I think need to be tended to, and that is one of them.[2]

Senator **Cohen**. Do you see the office, in your judgment, as one of being a facilitator, in terms of promoting ethical standards, an educator, as opposed to an enforcer?

Judge **Nebeker**. Yes.

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[2] See p. 290.

Senator COHEN. And do you recommend that you have enforcement authority?

Judge NEBEKER. No, because if I got it, I'm afraid the other suasive powers of the office would be dissipated. It is not a law-enforcement function.

We know that ethics has got to be defined differently than law, and particularly, criminal law. It's a group of moral principles, or a set of values.

It's principles of conduct governing an individual or a profession. And I think here we are dealing more with that, principles of conduct governing a profession, the profession of government, even though as Mr. Cutler says, at the top levels, it is in and out on a relatively short term basis; it is still a profession.

As such, to try to convert governing principles of conduct into law for purposes of enforcement would change the entire nature of, I think, what was in mind when the office was originally created; that is, to create attention, and if you will, subservience to a set of moral principles.

And the office is, I think, very effective in assisting the executive agency people to concentrate on that set of moral principles.

Senator COHEN. Well, it is a combination, is it not? It is not only moral principles, but it also embodies certain rules.

In other words, high level government officials should avoid not only actual conflicts of interest, and that is part of your job to educate those who are incoming, or those officials who are already appointed, about conflict of interest. And that applies to law, and regulation as well. But it also requires avoiding the appearance of conflict of interest.

That is something that the criminal laws do not touch, but certainly the ethical standards that one has do embody. So you would have an educational role not only of ethical principles, but legal ones as well, do you not?

Judge NEBEKER. I agree.

Senator COHEN. I didn't hear your response to Senator Levin's question about whether you think that OGE should be an independent agency.

We have had some who have argued that there is very little independence by virtue of the office itself being under the thumb of the Office of Personnel Management; and therefore, the standards have been rarely enforced as such, but have been enforced through the moral suasion of the office itself.

Do you think it should be made independent to the personnel office?

Judge NEBEKER. Well, my answer to the chairman—I don't think you were here at the time—is that I have experienced no command influence, to coin a phrase from the military, either from the Office of Personnel Management or from the White House.

Whether the office ought to be quote, "independent," in the sense of an independent agency or an independent commission is a judgment I am not prepared to express at this time.

It depends on the role that is ultimately chosen for the office. If we are to be made into an enforcer, or as the Chairman suggested, a cop, a greater degree of independence, in order to be effective, is going to be necessary.

But at what price? And we are dealing with a very delicate balance here between the consultation capacity of the office, which is quite viable, and which is threatened if the office becomes more of an enforcer.

And as you point out, we are dealing with standards of conduct, the appearance of impropriety, and if you term that a code, if you want to call it that in a generic sense, into an ersatz criminal statute, you're faced with void-for-vagueness problems of the highest order.

And so these are the delicate issues that have to be considered in deciding whether the role of the office ought to be moved more toward that of an enforcer, or cop.

Senator **Cohen**. We are going to have a former agency ethics official who is going to testify this morning that the DAEOs—are on, "that lonely battleground protecting the public interest, and are in a very difficult position to act independently because they are responsible to the head of the agency."

Do you feel that those DAEOs who are on the front lines and protecting the public interest in that sense have enough independence from, let us say, punitive action by the agency head who does not like the recommendations that a particular person is taking?

Judge **Nebeker**. When we both spoke a moment ago, the appearance of something, I am reminded in this area that there is an appearance of a conflict with these DAEOs, because they're wearing two hats.

And conceptually, theoretically, it is a very, very difficult position for them to be in. They do answer to two masters.

And I am not aware, in my short tenure, of any instances in which a so-called DAEO has compromised him or herself in this regard. But certainly——

Senator **Cohen**. How would you know?

Judge **Nebeker**. How would I know? Well, we deal pretty closely with all of them. And there is a very open line of communication. I think we would know.

Senator **Cohen**. Should they be subject to removal for cause only?

Judge **Nebeker**. DAEOs? Well, they come in different varieties, as I understand it. Some are presidential employees, and some are Schedule C, and, am I correct, some may even be career—depending on the size of the agencies, some may even be career employees.

So I do not know that there is a single answer to your question, because there are a variety of positions designated as DAEOs.

Senator **Cohen**. Well, let us suppose one of the DAEOs was removed because of a decision he made with reference to an ethics inquiry. Does he or she have any recourse?

Judge **Nebeker**. Only if that individual is a Schedule C. Then the recourse would be, the agency must follow its own procedures, and those established by statute, for discharge.

Senator **Cohen**. Thank you very much.

Judge **Nebeker**. If he is "at the pleasure," that of course is a different matter, if there are no rights of retention.

Senator **Levin**. Thank you, Senator Cohen.

This was before your time here, but Senator Cohen actually is the one responsible for this Subcommittee having jurisdiction over this reauthorization. He was Chairman of this Subcommittee when the Republicans controlled the Senate. He was the one who argued that we ought to have jurisdiction and it was his own role, actually, in the reauthorization of the OGE last time which I think was probably the most persuasive factor of that.

So we are lucky that we have Senator Cohen here because he really is an expert and kind of an historical memory of many of the issues that he has discussed with you and that we have discussed this morning.

Senator Heinz?

Senator HEINZ. Mr. Chairman, thank you very much, and I apologize that I was not able to be here at 9:30 when you started on this. Therefore, if I cover any grounds you did, I would apologize for that as well.

In reviewing the statute that establishes your position, Judge Nebeker, I understand there has been some discussion of subparagraph 4 and subparagraph 9. These provisions appear to stipulate that your Office is responsible for recommending appropriate action to correct any conflict of interest or ethical problems revealed by a review, and ordering corrective action on the part of agencies and employees which the Director deems necessary.

I understand that you have testified that you did not know what was really expected of you or your Office specifically in that regard. Is that correct?

Judge NEBEKER. Yes.

Senator HEINZ. Now, unlike Senator Cohen, I do not have as much background on the Office of Government Ethics as he or Senator Levin have, but you were confirmed by the Senate for your position, were you not?

Judge NEBEKER. That is correct.

Senator HEINZ. In the course of your confirmation hearings did any Member of the Senate ask you about your interpretation of the duties of the Office and of yourself as Director?

Judge NEBEKER. Yes, in a general way. And I have reviewed my testimony before this Committee at the confirmation hearing and parenthetically, Mr. Chairman, I am still aware of the request you made in there for some reports at a future time. I demurred at the time, Senator Heinz, because I was totally unfamiliar with the responsibilities of the Office and the practical effect of this particular statute.

I was not able to be informative at that time. And I am not sure how informative I can be four months later, but I can try.

Senator HEINZ. Is there a general counsel to the Office of Government Ethics?

Judge NEBEKER. No. I wish there were. There, I understand, was an effort to have Mr. Davis named as General Counsel and it foundered upon the rocks of precedent. He is Chief Counsel.

Senator HEINZ. Does the Chief Counsel's Department consist of career civil servants?

Judge NEBEKER. Yes, sir.

Senator HEINZ. In that connection, the general virtue of that kind of arrangement is institutional memory. I am curious, since this Office was established by law as of January 1, 1979, whether there is any institutional interpretation of Section 402 [b][4] and [b][9]?

Judge NEBEKER. Yes. Under the review of financial statements, the Office has done so quite systemically. I have learned that where these forms are submitted to us, in the main they are not adequately filled out and an awful lot of disclosure has to be gained by follow-up. And sometimes, of course, there has to be an agreement that there will be recusal or divestiture. Those are the kind of corrective things that are done under subparagraph 4.

With respect to subparagraph 9, it is my understanding that in so far as a sanction is concerned, or perhaps better expressed, a cease and desist kind of corrective order, there has only been one issued. I issued it 2 or 3 months ago. It is still with the agency for purposes of final resolution and as a result, I think it would be inappropriate for me to disclose it at this time. I would rather the entire matter run its course first.

Senator HEINZ. I do not wish to pry into the specifics of it, but is it directed at an agency procedure?

Judge NEBEKER. No.

Senator HEINZ. Or at an individual?

Judge NEBEKER. At an individual.

Senator HEINZ. So you do take the position that [b][9] does give you the authority to insist upon corrective actions being taken and if not, that you are empowered to take them yourself?

Judge NEBEKER. Yes, sir. The unique thing about that case that I can discuss is—and it is something that thus far I have had to do in a number of other instances—lacking any sort of formal fact finding procedure and authority, I have had to look to whether there has been a genuine issue of material fact, as we practicing lawyers say in summary judgment.

If there is no dispute of material fact and the facts as presented disclose misconduct under the standards of conduct or any other regulation, I feel I am quite free to act. But absent that, absent some authority to resolve disputed issues of fact in a fair way, I find it very difficult to say I have the authority to issue a corrective order which would have an adverse impact on an individual.

Senator HEINZ. I assume that someone has asked you whether you should have the authority to resolve disputed issues of fact?

Judge NEBEKER. Yes, sir. And on page 2 of my answers to questions submitted by the Chairman and Senator Cohen—on April 4th, I guess, I transmitted it up here—there is a checklist of things and that is included.

Senator HEINZ. Very well.

Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Senator Heinz.

Let me go back to this specific case, without getting into the details of it. In that case, you are saying the reason you entered the order pursuant to [b][9] is because there were no disputed facts?

Judge NEBEKER. That is correct.

Senator LEVIN. And if there were disputed facts, you then are unclear as to whether you have the authority?

Judge NEBEKER. Well, I am not unclear as to what I would have to do, but I am unclear as to whether I would have the express authority to do it. That is, I would have to in some way notify the individual of the nature of the so-called charges, or the scope of the inquiry being made and afford that individual an opportunity to be heard.

That does not necessarily entail a trial-type adversarial hearing, of course. It could be done on paper. That is, written views could be submitted. But absent some sort of legislative grace to do so, I've got my doubts as to whether I really can proceed under some sort of inherent power. As I have been wont to observe before, I know that there is a necessary and proper clause within the Constitution and I know that courts have fashioned something similar in the exercise of inherent power under Article III of the Constitution.

But whether individual agencies have this inherent power to do such things is a grave question in my mind and that is why I would be far more comfortable if there was at least legislative acknowledgement of the authority to do so. That is, to conduct hearings and find facts.

Senator LEVIN. Are you saying that there is some question in your mind as to whether we can give you the authority under the Constitution?

Judge NEBEKER. No.

Senator LEVIN. We can give you that authority?

Judge NEBEKER. Yes.

Senator LEVIN. There is a question in your mind as to whether we have given you that authority?

Judge NEBEKER. That is correct. You have not explicitly given that authority.

Senator LEVIN. And you do not think [9] is express enough?

Judge NEBEKER. No, sir. Nine is the authority to render judgment, but it does not provide the method by which you resolve facts before you do.

Senator LEVIN. The bill that Senator Cohen introduced last time I think would have covered that language, that problem. Part of it read, the authority of the Director under this section includes the use of Inspectors General to investigate possible conflicts of interest.

Would that do it?

Judge NEBEKER. No, sir.

Senator LEVIN. Do you have the language which would do it? Have you submitted that to us?

Judge NEBEKER. I have the language. I have not submitted it, no.

Senator LEVIN. What you need the express authority for, I think you are saying, and feel you do not have yet is the authority to make findings of fact?

Judge NEBEKER. That is correct.

Senator LEVIN. Is that specific enough or must it say how you make findings of fact?

Judge NEBEKER. I do not think it needs to say how, although I would suggest that it do so in terms of language that is consistent with the Constitution, such as, after affording an opportunity to know the nature of the inquiry or charges and an opportunity to be heard, as required by law.

Senator LEVIN. Not necessarily at a hearing?

Judge NEBEKER. Not a formal trial-type hearing, no.

Senator LEVIN. Is that language which you just gave us consistent with your concept of the OGE as a counselor rather than an enforcer?

Judge NEBEKER. Yes, sir. I think it is also consistent with the Constitution.

Senator LEVIN. Now, if you did not have the authority to enter an order but simply the authority to make findings of fact and specific recommendations to the agency, would that change anything constitutionally?

Judge NEBEKER. No.

Senator LEVIN. You still think you would have to have the express language in order to have the authority to make findings of fact?

Judge NEBEKER. Yes.

Senator LEVIN. Even if you did not have the authority to enter an order?

Judge NEBEKER. By an order, do you mean an enforceable order?

Senator LEVIN. Yes. In other words, if [9] were amended so instead of saying it was ordering, it would be recommending specific corrective action on the part of agencies. Let's just focus on the agencies.

Judge NEBEKER. Yes.

Senator LEVIN. If that were amended to recommending specific corrective action on the part of the agencies, or by agencies I do not see any great ambiguity in those words that you do, but I do not want to focus on that. If we amended Subsection 9 in the way I have just described, do you still think you need the specific authority to enter into fact finding?

Judge NEBEKER. Yes. Because at this level of individual, the mechanism available within each agency to find those facts is doubtful.

Senator LEVIN. If the authority was amended in the following way, that you had the authority to recommend corrective action on the part of the agencies—excuse me. If it were amended to read that you have the authority to recommend specific corrective action on the part of the agencies, if that were the language of the statute and there was no reference to fact finding at all, do you think that you would have the authority to make findings of fact as a part of that?

Judge NEBEKER. I do not think so. It would have to be implied, and that is what I am attempting to avoid, is any implied finding. I think for these purposes it ought to be pretty clear.

Let me make this point, if I may, Mr. Chairman. The statute, subsection [9] talks of corrective action. You have just addressed a question of making recommendations. Recognize that that is a bit broader than corrective action in this sense, if an act has been taken and it is complete and it is final, it is very, very hard to unring the bell.

In the case I spoke of a moment ago, I was confronted with undisputed facts of an ongoing course of conduct. Clearly, that can be corrected by ordering it stopped. But when something has been done that is, a fait accomplis, action becomes rather moot, except to the extent that one might say, well, if there is restitution to be had, at least you can correct it to that extent. But to say I am sorry does not really correct it.

So, your language, "recommend" or whatever it may be, would include the taking of some sort of post hoc action. Whether it is condemnatory or what ever depends upon, I suppose, the discretion of the agency. But corrective action is a rather narrow form of, quote, "relief," if you will. It confines what can be done.

Senator LEVIN. And you believe it would be too narrow, if we were going to revise this section, I take it?

Judge NEBEKER. Yes. I would think—perhaps and I am just shooting off the seat of my pants here—maybe both kinds of authority in juxtaposition in that section would be appropriate.

Senator LEVIN. Has your agency never done any fact finding? Haven't you found facts in specific cases in a general sense?

Judge NEBEKER. Not to my experience. Let me check with wiser institutional heads, if I may.

As I suspected, only in agency situations where it is determined the agency did this, the agency is not doing that, and it must do it. Sure, there is fact finding there. But there is not that delicate problem that we have when we are dealing with individuals and my sixth sense confirms it, that we have not done so.

Senator LEVIN. So that relative to individuals, you have not done any—made any findings of fact, even in a general sense of the word? I do not mean a technical, legal sense of that word. I mean in the general sense of that word you have not, in any action that you have taken, made findings of facts which were disputed relative to employees?

Judge NEBEKER. I am sure we have in that broad sense where we are asked, may we accept tickets to this banquet or things like that.

Senator LEVIN. No. I do not mean opinion. I mean findings where you find that even though the employee has said one thing, that the evidence points to something very different and that you think that the evidence is so overwhelming that you are therefore deciding that the employee ought to do A, B, C, and D.

Judge NEBEKER. I do not think so. We have not done that.

Mr. Davis informs me that we have relied on investigative reports, and that, again, poses the problem. As I have observed, I think, in my answers to some of your written questions, an investigative report by an Inspector General or a DAEO or general counsel is no substitute for an opportunity to be heard and notice of what is charged.

And I have experienced that in connection with another matter that is before us in which the investigator purports not only to report fact in his report, but to find fact, choose between conflicting versions. And it is not even clear in a report of that nature whether the individual who was the subject of the inquiry was, at the time he spoke to the investigator, aware of what others had said.

Senator LEVIN. Now, if you have relied on those findings or documents by various investigators or DAEOs or Inspectors General or whatever, you have then, based on those materials, in a general sense reached certain—made certain findings, haven't you?

Judge Nebeker. I suppose before I got here we have. In the instance that I am referring to where we had this conflict, I did not and could not resolve it. What my action was to the agency involved was, look, if the facts are this way, then you may wish to issue an order saying, look, do not do that sort of thing. If, on the other hand, the facts are as the individual says they are, then that may present you with a totally different situation but one in which you ought to consider some sort of policy action anyway.

Senator Levin. Okay. All right. Now, let's shift the subject slightly—and then I am going to turn it over to Senator Cohen—to the "you may wish" part.

Judge Nebeker. Good.

Senator Levin. If the facts are, "A," what you would tell the agency, or have told the agency during your tenure, "then you may wish to do X, Y, and Z."

Judge Nebeker. Yes.

Senator Levin. Why do you not tell the agencies, if the facts are such and such, "we recommend that you do X, Y, and Z?"

Judge Nebeker. I could and would do that where the situation is such that it is appropriate for me to make a recommendation. In the instance about which I was speaking, it had to do with the substantive operations of the Office.

Senator Levin. But you have no reluctance and you feel totally authorized under law to say to an agency, "we recommend that you do X, Y, and Z to this employee?"

Judge Nebeker. Yes. And the agencies, in my experience, have often come back and said, hey, look, if we do this, is this all right with you? Because the implication is, if it is not, they are not going to do it.

Senator Levin. All right. So you feel totally authorized and have made specific recommendations for actions to agencies?

Judge Nebeker. Yes.

Senator Levin. Okay. Senator Cohen?

Senator Cohen. Mr. Chairman, I think you have adequately covered some of the questions I have. But let us, for a moment, come back to the issue of rendering judgment. As I understand it, Judge, you feel that even though the statutory language already contained in the statute says that you may render judgment, you construe that as meaning render judgment only when facts are not in dispute?

Judge Nebeker. That is correct, at this point. Render judgment, if it is a judgment that is adverse to an individual's rights; whether that is the right of livelihood by condemnation publicly or something more concrete.

But in this area I have to deal with autonomous Executive Branch agencies and that is where I think the Chairman has hit the nail on the head in terms of it is ultimately their responsibility to do something. I can recommend it, insist on it, or whatever. But ultimately, it is their responsibility to do it.

I cannot, under the statute as it is presently drafted—and I would think under wise administration, anyway—interject myself into the substantive matters of the agency and how it handles its own personnel.

Senator COHEN. So the only factual judgment that you would make would be that the facts are in dispute?

Judge NEBEKER. Factual judgment, yes.

Senator COHEN. And no matter how incredible that dispute may seem to you, you nonetheless feel——

Judge NEBEKER. I have not been confronted with an inherently incredible contrary version of fact.

Senator COHEN. I am not asking you whether you have been. I am talking about as a matter of policy. Are you in a position to weigh the inherent lack of credibility of any factual allegation or dispute?

Judge NEBEKER. Yes.

Senator COHEN. In other words, if someone makes an allegation that looks, on the face of it, preposterous, would you nonetheless say, under the statute that you do not have the authority?

Judge NEBEKER. Oh, no. I would not say that. I think that we have got to operate in the real world. And if there is an inherently incredible dispute on what otherwise appears a totally reasonable set of facts, that has got to be recognized.

Senator COHEN. Well, I think Senator Levin did pose that question to you and it was unclear to me what your answer was.

Judge NEBEKER. If he did, I missed that emphasis.

Senator COHEN. You do in fact make judgments in terms of factual disputes, if on the face of it one half of that dispute seems to be, in your judgement, inherently lacking in credibility?

Judge NEBEKER. Yes.

Senator COHEN. I think that is all I have.

Senator LEVIN. One of the problems that we face is kind of a Catch-22 situation where there is an ongoing criminal investigation, particularly one that lasts a long period of time, which some of these have, and where administrative remedies also or may also be appropriate. We have seen a situation, a number of them, where the administrative proceeding just seems to stop. The total investigation stops while the criminal investigation continues.

In about 98 percent of the cases referred to the Justice Department for violation of the ethics laws, there is no prosecution problem. So statistically what happens is sometimes a year or two, or three years later there is no prosecution, and then we have to then start almost from scratch with an administrative proceeding.

Is there any reason why the administrative proceeding cannot continue simultaneously, provided it does not interfere with the criminal investigation, provided there is no announcement, for instance, of any result of the administrative proceeding or investigation, if that might interfere with a fair trial, assuming there ever were a trial?

But my question is, it just seems we have got a Catch-22 where you have got an administrative proceeding which is held up by a criminal investigation. You can use the Meese case, but it is true in a number of other cases, where you have been asked to review certain things administratively, or where there is an independent counsel looking at the matter.

The independent counsel has indicated, based on evidence that he has to date, there is not going to be an indictment in the Meese case. But nonetheless, as I understand it, any administrative review of these matters has been held up.

Now, is there not a way that we can continue the administrative investigation in a way which does not interfere with the criminal investigation? We have worked out these things, by the way, as a Subcommittee, with the independent counsel and with, I think, the Justice Department—but at least with the independent counsel—where we have been able to interview certain witnesses and gather certain data in matters so that we can continue our proceeding. But there are certain things we do not do. We agree, for example, we will not talk to that witness but we will continue all the other aspects.

So generally—I am not referring now to a specific case—generally, how do you get out of this, or help us get out of the Catch-22? Or how can we help you get out of this Catch-22 situation?

Judge NEBEKER. Your question is predicated on an assumption that it would not interfere with the criminal investigation.

Senator LEVIN. No. I say where it will not interfere.

Judge NEBEKER. Where it will not interfere there is no reason why it could not go on at the same time. But that qualification is so great and so important that it probably—as Mr. Keeney said yesterday—probably winnows them down to where it is on a case-by-case basis. Those cases of independent proceeding administratively are very, very rare.

You ask, is there a reason. I can think of, aside from your reference to published notice in the paper depriving an individual, in the event of prosecution, of a fair trial. There are other reasons why the two very often cannot proceed. That is, why there is an effect upon the criminal investigation.

I can think of two right now. One, if witnesses are interviewed a second time by an administrative tribunal, those witnesses' statements or notes taken as a result of those witnesses' statements to the administrative authorities become producible and now at a criminal trial, should one occur, you not only have the witness' testimony before the Grand Jury, but you also have the witness' testimony or statements respecting his testimony given to other Government agents. And there is a question whether they must be produced under the Jencks Act. There is a question whether if they are exculpatory in any way the prosecution has a duty to know of them and then to turn them over under the *Brady* doctrine.

So you create the potential for evidentiary havoc in the event of prosecution by having witnesses in effect deposed or statements taken by other than law enforcement officials connected with the Federal Government.

There is another example. Let us assume in a case that administrative action has been completed and taken and that the individual has been removed, has been ordered to do this or that or the other, or has been given a sanction of some kind. And this comes out at the trial. And it has ways of coming out.

The accused himself can let the jury know he has already been slapped. And right away, the desire of the jury to convict becomes dissipated. In short, well, wait a minute, the Government has already got its pound of flesh out of this guy; we are not so interested in bringing in a verdict of conviction.

In short, there are, Mr. Chairman, a lot of very subtle but real reasons why I think the thrust of Mr. Keeney's testimony yesterday has got to reveal that it is the rule that the administrative process awaits the criminal investigative process. And if there are only two percent prosecuted cases or convictions——

Senator LEVIN. No. Prosecuted cases.

Judge NEBEKER [continuing]. Prosecuted cases, I am not sure it would not be reduced even further by that fact. In short——

Senator LEVIN. It cannot be reduced too much further.

Judge NEBEKER. Well, it cannot. But you can cut it by 50 percent down to 1.

Senator LEVIN. Some of us would call that cutting it by 1 percent.

Judge NEBEKER. All right.

Senator LEVIN. Let me just challenge you on that.

Judge NEBEKER. All right.

Senator LEVIN. There are lots of reasons why an administrative proceeding should not proceed. I agree with that part of what you said. Indeed, there are lots of reasons why if it does proceed, it must proceed very cautiously. But I am troubled by your statement, "it is the rule." Mr. Keeney even said, yesterday that, it is case-by-case.

Judge NEBEKER. I interpreted what he said, Mr. Chairman, as the instances in which the administrative proceeding goes ahead independent of but contemporaneously with the criminal investigation. That is decided on a case-by-case basis.

Senator LEVIN. But whether it proceeds independently, it seems to me, also should be decided on a case-by-case.

Judge NEBEKER. Well, I guess it is to the extent——

Senator LEVIN. Can I get you to at least to agree with me, that you can proceed down the administrative road but not necessarily to a conclusion. You can avoid that second problem about reaching some kind of a sanction which then could be leaked to the jury to dilute the impact of the prosecution. You can do that by not reaching a conclusion.

But would you agree with me that at least whether or not you proceed independently ought to be carefully analyzed—I could not agree with you more on that—on a case-by-case basis?

Judge NEBEKER. Yes. If there is initiative somewhere to say, let's go on a parallel track, then it has got to be on a case-by-case basis.

Senator LEVIN. No, you would be the one to take that initiative.

Judge NEBEKER. I agree. Either I would——

Senator LEVIN. Now, the question is, should you not in each case where you are looking at something administratively and there is a pending criminal investigation, should you not in each case decide whether you want to proceed very carefully? But shouldn't you decide whether to proceed on a case-by-case basis?

Judge NEBEKER. Yes, or the agency itself. Often that is where the administrative process would take place.

Senator LEVIN. Either way.

Judge NEBEKER. Yes. But my experience, and I think the advice I would get from my colleagues, is that we are requested to stop if the matter is being considered, on an individual case basis.

Senator LEVIN. But see, that is where Mr. Keeney yesterday seemed to have backed away from his original statement. And let me give you the guidelines that I have:

> Upon making a referral for criminal investigation to the Attorney General, the referring department or agency should suspend any further administrative investigation and/or interrogation of the employee with respect to the area of suspected criminality.

But then the next sentence, it seems to me, is very important:

> However, if such independent administrative investigation is desired by the department or agency, it should be coordinated with the interested U.S. Attorney, division in the Department of Justice, and/or investigative agency to ensure that such administrative action does not jeopardize the Government's criminal investigation or prosecution.

That second sentence, it seems to me, is very important, but it is overlooked because what is generally assumed is what you just said—"it is the rule."

Judge NEBEKER. Yes.

Senator LEVIN. It is not. The rule is two sentences, not one. The rule is, suspend it, but, if you want to proceed independently, coordinate it. That is part of the rule, too.

So, that is my only point here, is that I would urge you and other agencies here to read the second sentence of that as well as the first. I am not urging you to proceed. I am just saying, make a decision whether you are going to proceed on a case-by-case basis, and if you do, obviously, do it very carefully.

I am sensitive to rights of accused; and I am sensitive to not messing up prosecution. I think we have to be. But I am also sensitive to the importance of proceeding administratively in ethics cases, and that has been stymied at times, just completely stymied by the fact that there is a pending criminal investigation which takes three years, the result of which most of the time—Ninety-eight percent, statistically—is not to proceed, and so what we have is this Catch-22. My only point, and I think you may agree with it now, is that read both sentences of that policy and go at it case-by-case.

Judge NEBEKER. I understand your point.

Senator LEVIN. Do you agree with that approach? I do not want to badger you, but——

Judge NEBEKER. No, and you are not. Yes. I agree with it. But I think that is in practice what is done, because so few do proceed parallel and contemporaneously, one can easily get the notion that the second sentence is ignored. But I am not sure it is. I am advised that it is not.

Senator LEVIN. Well, okay. It was just that the rule language that you used, and Keeney started that way yesterday, too, by the way, and then also said, no, it is case-by-case and ad hoc as to whether or not there is an independent proceeding. Just so long as we do not assume it is the rule.

Judge NEBEKER. I think we are on the same wave length on that one.

Senator LEVIN. Okay.

Senator COHEN. Senator, if I could just interject. If the Attorney General or an independent counsel, came to you and said, "Judge, we have an investigation underway and we would like you to cease and desist because you may prejudice our case," I gather from your statements that your first inclination, or perhaps your last, would be to cease and desist?

Judge **Nebeker**. Yes. I would not question the merit of that demand. I would stop.

Senator **Levin**. Then we are not on the same wavelength.

Judge **Nebeker**. We are not?

Senator **Levin**. Because the point is, if you want to proceed independently, you should question the demand and say, "wait a minute, it says right here that I can proceed independently providing I coordinate it. Now, Mr. Justice Department, or Madam Justice Department, here is how I think we can proceed independently without messing up your prosecution; here are some of the witnesses we want to talk to. Do you have any problem with that?"

You can work these things out, you see.

Judge **Nebeker**. Well, and if they say, yes, there is a problem with it, I think I would have to stop.

Senator **Cohen**. Don't you feel you have the independence to make your own judgment as to whether or not it would interfere?

Let me give you an example of what Senator Levin is talking about. We have many cases in which the Justice Department may call upon this Subcommittee not to inquire into certain matters because of an ongoing criminal investigation.

Judge **Nebeker**. Right.

Senator **Cohen**. We have a comparable situation during the Iran/Contra investigation in which the independent counsel came to the Committee and said, "please, do not grant limited immunity to the following witnesses."

We took that into account and said, "thank you very much, Mr. Counsel, but we have a corresponding obligation. Just as you have an obligation to investigate into possible criminal misconduct, we have an obligation to decide whether or not changes in laws have to be made, whether existing laws may have been circumvented, and what needs to be done, and therefore we are going to proceed but we will work out some sort of an acceptable compromise which allows you to continue your investigation and at the same time allows us to continue our investigation."

I think that basically what Senator Levin is asking you, is whether or not you feel you have not only the power, but also an obligation to see whether or not you could work out such a compromise that would allow the criminal investigation to go forward and at the same time allow you to proceed to an administrative investigation to make a determination, perhaps, at some final point, whether or not the ethics laws have been followed.

What I gather from your reaction was that once the Attorney General comes in and says, "Judge, we are investigating this matter, we do not want you to run the risk of compromising that investigation, therefore we are asking you, indeed, we are telling you, not to go forward."

Your position would be, "all right, Mr. AG, I am stopping right now."

Judge **Nebeker**. Well, Mr. Davis advises me that with respect to one very sensitive matter involving the Attorney General, we have done as the Chairman has suggested. That was before I got there. I have really not had the occasion to say to the Department, if it requests that we hold off, justify your request.

I could do it, no question about it. And if I disagreed, I supposed we could have a big conference about it and try to resolve that.

Senator COHEN. It is not a question whether you have had occasion. I think what Senator Levin is asking you is, hypothetically, if you are presented with such an occasion, what would your reaction be? Would it be to accept on the face of it the request from the Justice Department to stop? Or would it be asking the Justice Department to come in and sit down with you to find out what the nature of the complaint would be, whether their allegation concerning any interference with their investigation in fact has merit, whether there is an acceptable way to work out a compromise that allows the AG to proceed, or the independent counsel.

Judge NEBEKER. Yes, I would do that. I could do that. That does not bother me at all. I recognize——

Senator COHEN. Not bother. It is not a question of bothering you. The question is, what is your attitude about proceeding in this fashion? Is it one to affirmatively seek out that sort of arrangement? Or is it one to give the preponderance of the weight to the Justice Department and only in the most extraordinary case come forward and say, "Wait, I would like to see if we cannot work something out?"

In other words, what is your initial reaction? If the Justice Department says, "We have a criminal investigation," is it your inclination to say, "all right, we will cease and desist?" Or is it to say, "come talk to us, let's talk and see if we cannot work it out?"

What would be your attitude toward that situation? Does it depend upon how high up the official is? Does it depend on how low he might be? What is the general procedure you would follow in those cases?

Judge NEBEKER. I guess the general procedure is that I would start with the presumption that if the request was made, it had a basis and I would honor it. Only in apparent exceptional circumstances would I challenge it and proceed from there.

Senator COHEN. And how would you know——

Judge NEBEKER. That may not be the answer you want, but I am trying to be honest with you.

Senator COHEN. Exactly.

Judge NEBEKER. That is probably what I would do.

Senator COHEN. All right.

Senator LEVIN. I think we really have a disagreement on this then, and I am not sure how to address it—whether it ought to be report language, assuming there is agreement on this Subcommittee, or what. But I think there is a disagreement here as to what your automatic reaction should be.

And what I suggest it ought to be—again, this is my own personal suggestion and others on the Subcommittee will speak for themselves—what you ought to do is try to figure out a way that you can proceed with your duty in a way which does not interfere with someone else's duty, rather than say, "okay, I am going to assume it would interfere." Because you have an obligation here, and I think that—again, I say with all seriousness—that this obligation I believe can be carried out significantly in many instances in a way which does not interfere with criminal prosecution.

We have all had circumstances on our Committees and Subcommittees where this has been true. We have all worked out—not all but many of us—have had to work out arrangements with independent counsels, with Attorneys General, as to how we can proceed to do our duty at the same time they are proceeding to do their duty without any interference. So the instinct I would urge upon you should be to find a way if you can.

If you cannot, so be it. Then you just suspend totally. But if you can, then you ought to. That is, in a nutshell, what I am saying.

Judge **NEBEKER**. In ruminating on this topic, it seems to me that where Senator Cohen was speaking of the Senate proceeding, that those are probably matters of equally great importance. I think that administrative action, in comparison with criminal action, has been historically viewed—and it probably shapes my thinking—as somewhat subordinate to the more important criminal process that is going on.

And where there are co-equal reasons between 2 branches of Government to proceed on a parallel basis, certainly there has got to be that kind of accommodation. But the subordinate process—and perhaps that is where you have a fundamental disagreement, and I am not sure you are not right—but I think it is accepted that the administrative process is somewhat—I hate to use the word "inferior," but certainly subordinate to the criminal process and for that reason it just is held up.

And I recognize the cost involved, because what you are ultimately saying is, look, by the time you get around to the ability to impose some administrative sanction it is moot, the individual has resigned.

Senator **COHEN**. Or you are not there.

Judge **NEBEKER**. Or I am not there.

Senator **COHEN**. Right.

Judge **NEBEKER**. But I recognize your point.

Senator **LEVIN**. The question is not whether it is subordinate, Judge. The question is whether it is important enough to proceed with it, providing you do not interfere with another function. The ethical function that has to be performed here is a very key function. As a matter of fact, I think it has been diluted by the emphasis on the criminal, at least in one famous case that is pending.

I mean, in the case of Attorney General Meese, whether he is indicted or not is an important issue, and the indication is that he will not be. But there is also another important issue here, which is an ethical judgment. In part, you are going to help reach a judgment on that, or you have been asked to reach a judgment. And I just do not think it is the right approach to automatically suspend your inquiry because there is a criminal inquiry going. I just think it is wrong.

And by the way, this is not just a hypothetical case.

Judge **NEBEKER**. I understand.

Senator **LEVIN**. This matter has been referred to you and there was a response from your Office saying that independent counsel McKay has suggested to you, that you halt your process, and that his action of necessity "requires deferral on the part of the Department and this Office until his review is completed."

It does not of necessity. His action requesting you to halt does not necessarily result in that. It is a very important distinction. We, as a Subcommittee, have been requested by an independent counsel, to withhold action. We said, "wait a minute. We can do this, this, this and this without any interference."

He said, "well, maybe you can, but do not do that; do just B, C, D, H and M. Leave off the others if you would." And then we go back and forth and we finally reach an agreement. His request to us does not of necessity stop this Subcommittee from functioning in an area where we have a duty to do it.

I would just suggest to you—and again, if you do not buy it, then, you know, you are being candid and honest and that is fine. I think that is a very valuable characteristic, by the way, which we all cherish in you and in others, so I am not trying to browbeat you into changing your mind. If you just do not agree with it, fine. But I would suggest to you, and I think to this Subcommittee, ultimately, if you do not agree with it, that of necessity you are not stopped.

It may be desirable that you suspend in an individual case, or it may be desirable that you partially suspend a case. But not that you necessarily or automatically suspend all cases. That is the difference and I would urge you—because we are going to have to move on, unless Senator Cohen has additional questions—I would urge you to give some additional thought to that issue.

It may look like a nuance, but it is very important in terms of how you approach enforcement. And I would like, if you would, to give us some further thought on that, if you have it, so that we can know as to what guidance we should give you on this issue.

Judge NEBEKER. And that ties in, Mr. Chairman, with what we were discussing earlier on the capacity or authority of the Office to enter into some sort of fact finding process. Were I to decide of necessity I must proceed parallel to Mr. McKay's investigation, clearly, or I should say, I need clear authority as to what I can do.

Senator COHEN. Well, could I ask one brief question.

Senator LEVIN. Sure.

Senator COHEN. You are not suggesting that by the Committee writing into the law giving you, or the Office, fact finding authority, that that in and of itself implies you also would then have the authority to negotiate with the Attorney General or the independent counsel? You are linking the two together; namely, give me fact finding authority and then I can move on to the second step of the equation.

Judge NEBEKER. Well——

Senator COHEN. Given your interpretation, even if you have fact finding authority, given your inclination, if the Justice Department comes in, you will still say, thank you very much for advising me, Mr. Attorney General, and I will cease.

Judge NEBEKER. Yes. But I suggest that in instances in which I were to agree with the Chairman or with you that I should proceed independently and parallel——

Senator COHEN. Is the fact-finding authority what you are looking for in order to have the authority to then tell the Attorney General, "I am sorry, Senator Levin and Senator Cohen have said I now have fact finding authority and therefore I am going to proceed; let's see if we cannot talk?"

Judge NEBEKER. Well, I do not think I am saying that.

Senator COHEN. What you just did is you mixed the two together.

Judge NEBEKER. I simply brought back the focus on the fact finding authority, because if it is decided to proceed parallel in an administrative matter, somebody has got to be able to decide facts.

Senator COHEN. Well, I agree with that. What I am disagreeing with is that you have somehow linked the two proposals together. What Senator Levin is suggesting, is to forget about the fact finding right now. Forget about that for the time being.

Judge NEBEKER. I understand that.

Senator COHEN. Come back to the final question, assuming that there is an ongoing criminal investigation and the independent counsel or the Attorney General comes to you and says that they want you to stop, you are not suggesting because you have fact finding authority that has been given to you statutorily, therefore you are now in a position to tell the Attorney General that you have a concomitant obligation to go forward.

Judge NEBEKER. No.

Senator COHEN. Okay.

Judge NEBEKER. I am not saying that.

Senator COHEN. That is sort of what was implied by your statement.

Judge NEBEKER. If it was, I misspoke.

Senator COHEN. Okay. One final point, Judge, can you conceive of a situation in which an Attorney General or an independent counsel who has an ongoing investigation not coming to you and saying, "Stop, you are going to interfere with my case?"

Judge NEBEKER. No.

Senator COHEN. So it is virtually automatic any time an AG or Justice Department official is conducting a criminal investigation, it is automatic he is going to come to your office and say, stop the administrative process? There is not doubt in your mind, is there?

Judge NEBEKER. None.

Senator COHEN. Okay. Thank you.

Senator LEVIN. Thank you, Senator Cohen.

Judge Nebeker, you and your colleagues, we appreciate your appearance here. I have a number of additional questions and I think others may also have additional questions, but we are out of time. There is a vote here now. We have other witnesses. So we will be submitting those to you for the record and we will await that information back from you that you have indicated you hopefully can get to us by the end of next week.

Thank you so much for your appearance and for your candor. We appreciate both.

Judge NEBEKER. Thank you, Mr. Chairman. It is a pleasure and I am pleased that Senator Cohen is responsible for having this Committee as the oversight committee.

Senator LEVIN. Are you still pleased?

Judge NEBEKER. I am, sir.

Senator LEVIN. Good. We are, too. We are pleased to have you where you are at, too.

Judge NEBEKER. Thanks.

Senator LEVIN. Thank you, so much.

Our next witness is Rosslyn Kleeman, who is the Senior Associate Director of the General Government Division of the GAO.

Ms. Kleeman, thank you for your appearance. We are going to do something here which we do not often do, but we are going to, in the interest of time—and I hope you will understand—we are going to make your testimony part of the record and ask you some questions instead, if that would be all right.

TESTIMONY OF ROSSLYN KLEEMAN, SENIOR ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE,[3] ACCOMPANIED BY LYNN GIBSON, OFFICE OF GENERAL COUNSEL

Ms. KLEEMAN. That is fine. I would like to introduce Lynn Gibson from our Office of General Counsel, who can help me answer some of the questions that have legal implications.

Senator LEVIN. All right. You have identified in your testimony certain problem areas in the Federal ethics program, but you have also given us an overall assessment of the Office which seems to be a fairly positive one; is that correct?

Ms. KLEEMAN. Yes, it is. And certainly since Judge Nebeker has been there we have had very good cooperation.

Senator LEVIN. One of the issues we asked Judge Nebeker about which we have wrestled with relative to the OGE is whether or not it is a cop or an advisor, whether it is a counselor, in other words, to Federal employees and agencies, or an enforcer.

In your written testimony, you stated that all former OGE directors told you that OGE should not be an enforcement agency, that they saw the role of OGE as one of facilitating an understanding, to use your words, I believe, of what the ethics laws require, and I think Judge Nebeker probably would come down also on the side of the OGE being an advisor and an counselor rather than an enforcer.

Do you agree with that role for the OGE?

Ms. KLEEMAN. I think they felt it was very important that in order to get cooperation——

Senator LEVIN. How about you? Do you believe——

Ms. KLEEMAN. I think you would have to change the statute quite a bit before they could properly be an enforcer.

Senator LEVIN. In other words, you do not think that the statute now gives them enforcement power?

Ms. KLEEMAN. I will defer to Ms. Gibson on that question.

Ms. GIBSON. I think that, as you discussed earlier, under Section 402[b][9], OGE is authorized to order corrective action on the part of the agencies and employees that he deems necessary.

Reading that provision in connection with other sections of the Ethics Act, I would say, no, OGE does not have enforcement power in the sense of being involved in a punitive process and taking punitive action against employees.

Senator LEVIN. Despite the presence of subsection [9], you do not believe they have enforcement power now?

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[3] See p. 221 for Ms. Kleeman's prepared statement.

Ms. GIBSON. Well, reading that, as I say, in the context of other provisions, for example, in——

Senator LEVIN. I understand that. But reading that section in the context of other provisions, you do not believe there is enforcement power now in the statute?

Ms. GIBSON. Not enforcement power in the sense of taking punitive disciplinary action against employees now.

Senator LEVIN. Okay. Now, should the OGE be in the position of making findings, at least, when unethical conduct has occurred?

Ms. KLEEMAN. I am not sure that under the current law that——

Senator LEVIN. No. Should we give them the authority to make findings, at least, at a minimum.

Ms. KLEEMAN. Oh. That is a legal issue, too, I think.

Ms. GIBSON. In my judgment, it would depend on what the outcome of the findings would be.

Senator LEVIN. What about specific recommendations?

Ms. GIBSON. Well, OGE does in a sense do fact finding under the public financial disclosure provisions.

Senator LEVIN. But do you have any problem with them having the power to make findings of fact and/or specific recommendations for remedial action? Not enforcement, but specific recommendations; do you have any problem with that?

Ms. GIBSON. No, I do not have a problem with that. I think that when the corrective action provision was enacted in 1978, that one thing that was envisioned was that OGE would be able to order corrective action and recommend administrative sanctions, recommend to the agency what should be done. I think that is well within its authority.

Senator LEVIN. Okay. Thank you.

Ms. Kleeman, do you think the OGE's presence within the OPM structure has a chilling effect on OGE's performance, or could have a chilling effect?

Ms. KLEEMAN. I think it probably does. We hear from so many people that OPM is a very political agency these days and I suspect that that does have a chilling effect. It certainly does not give the appearance of independence, being under the Office of Personnel Management.

Senator LEVIN. Do you believe it should be made an independent agency or a separate agency?

Ms. KLEEMAN. I personally believe it should. I think it needs that appearance of independence that I do not believe it has now.

Senator LEVIN. Okay. You have talked to a number of DAEOs, the agency ethics officials. Are they vulnerable, in your view, to pressure from their agency heads?

Ms. KLEEMAN. I have not heard that from any of them. No, they have not mentioned it.

Senator LEVIN. Whether you have heard it or not, do you think they might be vulnerable?

Ms. KLEEMAN. I suspect there could be occasions when they could be pressured.

Senator LEVIN. I think what we will do—I know you understand because you are both pros around here, about how this happens—but I now have a vote that I am going to have to make. I think the key questions that I wanted you two to answer have been asked and answered.

We have some additional questions which we will submit to you for the record.

Ms. KLEEMAN. We would be glad to do that.

Senator LEVIN. Please forgive this way of operating here.

Ms. KLEEMAN. Thank you.

Senator LEVIN. We are going to recess for about ten minutes.

Thank you.

[Brief recess.]

Senator LEVIN. We will come back to order.

Our next witness is David H. Martin. Mr. Martin, we welcome you again, welcome you back.

Mr. Martin is a former director of the Office of Government Ethics and has appeared many a time in front of this Committee.

Greetings. What are you doing these days? May I ask on a personal note.

TESTIMONY OF DAVID H. MARTIN, FORMER DIRECTOR, OFFICE OF GOVERNMENT ETHICS [4]

Mr. MARTIN. Well, I am practicing law. I am with a law firm here in town, the Washington office of a large Ohio law firm.

Senator LEVIN. As we say, you are making a living again.

Mr. MARTIN. Trying to, and doing my best, as always.

Senator LEVIN. We welcome you back.

Mr. Martin, you served for four years—and let me, if you do not mind, do the same with you as we have done recently with the witnesses because of time, and that is to put your statement in the record. I have read your statement and if you have no objection, I would like to just ask you some questions.

Mr. MARTIN. I would only like to make two points and it will only take thirty seconds.

Senator LEVIN. Fine. Go ahead.

Mr. MARTIN. One is that I do think it is absolutely essential to simplify the financial reporting requirements and that I have been a part of two studies, the Administrative Conference Study, a working conference on ethics, and the Kennedy Project, I was the Subcommittee Chairman. And both of those groups—I understand that you have heard testimony from people representing those groups—both of them recommend two areas or two sections for reporting financial disclosure.

I do not really think that is necessary. I think you should simplify it and make it administratively, as least, capable of the people who administer the ethics laws and the financial laws to review them in a timely fashion. They cannot do that now unless you dramatically increase the staff.

Secondly, the Ethics Office is very important to the overall scheme in raising the ethical awareness of the general public and the Government and it certainly ought to be increased in size. And finally, it should be independent, an independent office. I agree with that.

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[4] See p. 240 for Mr. Martin's prepared statement.

Senator LEVIN. Four years, I guess, you were the director of the OGE, so you are familiar with the relationship between the OMB and the OPM and the White House and OGE. You have indicated just now that you believe that the OGE should be an independent agency, and I take it that that means to you that the position should be protected by a good-cause removal provision?

Mr. MARTIN. Yes.

Senator LEVIN. Can you tell us why?

Mr. MARTIN. Well, there are two reasons why. One, the Office ought to have the appearance of independence and it may not now. It in fact does, I think, in terms of interference from OPM or from other parts of the Government. But it ought to have that.

Secondly, in obtaining personnel, in representing your budgetary needs, in representing your needs to function and what the obligations are in the Office, I think you can do a better job if you do not have to, one, submit everything through OPM and you can go directly to the OMB, and secondly, you can have maybe a better effective voice with the people who appropriate monies.

Senator LEVIN. What about the independence of the DAEOs? Do you believe that they are vulnerable since they serve within the agency that they are judging?

Mr. MARTIN. I am unaware of any cases where a DAEO was compromised. I am aware of cases where they were frequently frustrated with their inability to, one, either produce the kind of program they wanted to produce, or to effect the changes that they thought were necessary or, let's say, to make the recommendations that they wanted to do have some effect.

But I do not think any of them feel they are not independent. I think they feel they have a strong backup position with the Ethics Office. I do not see any other way for the system to operate, other than to have them be a part of the agency. Otherwise, they are pariahs.

Senator LEVIN. Are you saying that you have not heard from DAEOs that they feel vulnerable, or that you have initiated conversations or entered into conversations with DAEOs and that they specifically told you they do not feel vulnerable? Is it that you have not heard?

Mr. MARTIN. Well, I am not aware of anyone coming to me and saying, my job is on the line.

Senator LEVIN. Well, no. Or that I feel some conflict, or I feel some pressure, or I am in a bad position, or I am in a conflict situation because I am part of this agency and yet—don't you think there is a vulnerability there?

Mr. MARTIN. There is a tension there. I do not know if it is vulnerability. There is certainly a tension between what the DAEOs position is vis-a-vis the head of the agency. But that is different with each head of each agency and each DAEO. Sometimes it might be the DAEO or the working ethics official might be a direct appointee of the head of that agency, maybe not.

Relations, I think, in general are good between the DAEO and the agency heads.

Senator LEVIN. Is there any way that we can reduce that tension so that the DAEO will feel freer to take or recommend whatever steps he or she thinks are appropriate?

Mr. MARTIN. I do not think so under the present decentralized system. And I think they have to be a part of the agency. I do not think there is.

Senator LEVIN. You cannot think of anything that the OGE can do to support them and to make sure they feel truly free to make free recommendations?

Mr. MARTIN. The Ethics Office already does that, I think. It is very supportive of the DAEOs and makes that very clear. And the ongoing training and support is there.

Senator LEVIN. Can you give us a list or give us your recollection of which agencies you felt were the best and which were the worst in terms of their ethics programs?

Mr. MARTIN. Well, the worst are the easiest to define; the best not so easy. The larger ones generally had the most problems because of the lack of manpower and commitment of resources. The State Department is an obvious one. We had a lot of problems with the State Department; HUD, we had a lot of problems.

The Treasury Department, on the other hand, was a very good one. They were sensitive to and made the ethics program a big part of their operation. The general counsel and, I think it was, Ed Wilson was the DAEO there who did most of the work, were very sensitive and participated in a wide range of activities in the ethics arena.

Senator LEVIN. Were you here when Senator Cohen and I discussed with Judge Nebeker the question of the corrective action enforcement power capability of the agency?

Mr. MARTIN. I was here for part of it.

Senator LEVIN. Okay. What is your understanding of the ability of the OGE director to order corrective action?

Mr. MARTIN. Well, as I interpret it, in the financial area I think it is absolute in the financial reporting area. I think that the director has authority to order the filing of information, the amendment of information, to conduct interviews, to conduct his own internal investigation to determine if in fact there is a proper filing or an inaccurate filing.

Outside of that, it is fairly nebulous in terms of what the Director's authority is. You cannot, I do not believe, overlay a punitive administrative function within the OGE system over the administrative remedial actions that a head of an agency can take. I think it would be a disaster if you tried to do that.

So you work within the system, and the system is the head of the agency and is responsible not only for their ethics program but also for remedial actions when someone violates either a standard of conduct or some other matter.

I think the courts would support that. There was a case, in fact, that came before—I think it involved a gentleman named Williams—in which the legal counsel to the, or special counsel to the Merit System Protection Board tried to take that authority and direct that certain punitive or remedial actions be had. And the court rejected his authority. Bill O'Connor was the special counsel then.

And I think the court would take the same position with the Ethics Office, that it is not authorized by law and, too, it would create an administrative nightmare.

Senator LEVIN. Not authorized by law?

Mr. MARTIN. No, I do not believe it is.

Senator LEVIN. You do not think subsection [9] is the authority?

Mr. MARTIN. I do not think it authorizes you to create such a—no—administrative overlay for the agency head. No.

Senator LEVIN. What does it mean then? What does subsection [9] mean?

Mr. MARTIN. Well, as I indicated as to the financial reporting, I think it is absolute. That is clear.

As to the others, I think it means, I think, in terms of an agency's program, I think the director can order that certain training be had, that certain programs be instituted or that a certain—not that that is a good way to do it, because I think the director has to recommend, has to push. It is like convincing someone that they ought to mend their ways and you have to have the good will of the DAEOs and the agency heads in order to get changes.

If you were very autocratic in ordering that kind of thing, I think it would be counterproductive.

Senator LEVIN. Are you saying that the language should not be read more broadly than that? Or that it cannot be read more broadly?

Mr. MARTIN. I am saying that practically it should not.

Senator LEVIN. Should not be. And that is for constitutional reasons or for administrative reasons?

Mr. MARTIN. That is for administrative real-life reasons.

Senator LEVIN. Do you think subsection [9] should be changed?

Mr. MARTIN. Yes. I think you ought to clarify it. I think you ought to make a decision as to what it is. In terms of the financial reporting, it is clear to me. But yes, I think you ought to clarify that. It has been a source of some consternation for my 4 years, and you and I have agreed and disagreed on various aspects of it. But yes, I think you ought to, either though——

Senator LEVIN. Have you ever ordered anybody to do anything when you were there?

Mr. MARTIN. No.

Senator LEVIN. Not an agency but, first, an individual. Have you ever ordered that any action be taken relative to an individual?

Mr. MARTIN. Well, in terms of filing information or remending a report, yes, I think we did.

Senator LEVIN. Other than that?

Mr. MARTIN. Well, other than that, there were some instances where we wanted a person disciplined or reprimanded or even in one instance fired, and we used moral persuasion to convince either the agency head or the general counsel to take that message to the right authorities. And that happened, but it was a very slow, excruciating process.

Senator LEVIN. Even with the authority to order in your hip pocket? In other words, the agency knew you had that club, ultimately, for whatever it means. It is sitting there, that language in subsection [9]. Does that not give you some clout to use your moral suasion with the agency?

Mr. MARTIN. Yes, it certainly would, and does.

Senator LEVIN. We had a discussion with Judge Nebeker about a fact finding role and the role of recommending specific actions. Do you think OGE needs some specific authority in that area? Either one? To find facts and to make specific recommendations?

Mr. MARTIN. Well, it has authority now to use the IGs for fact finding.

Senator LEVIN. Just in disclosure cases?

Mr. MARTIN. Pardon me?

Senator LEVIN. Is that not just in financial disclosure cases?

Mr. MARTIN. Oh, no. I think it could use the IGs in almost any capacity; standard of conduct investigation or a criminal conflict of interest law investigation.

Senator LEVIN. Okay. You do not think it needs any additional help in that area? I think that that language was limited to financial disclosure.

The language is: "The authority of the director under this section includes the authority to request assistance from the Inspector General of an agency in conducting investigations pursuant to subsections [b][3] and [b][4]." And [b][3] is financial disclosure requirements and [b][4] is financial statements. So I think it is limited to that.

But if it is not, in any event, you would recommend that it be broader than that, I guess.

Mr. MARTIN. Well, in practicality, I used it broader than that. I requested IGs to do investigations beyond financial and they were very cooperative.

Senator LEVIN. The language in the bill I referred to before that Senator Cohen sponsored and I supported the last time around here on reauthorization did have broader language and I think we will be talking about including that broader language anyway. But I am glad to know that with or without the broader language you have been able to use the IGs.

What about making recommendations, specific recommendations? Do you have any problem with existing law as to your authority to make specific recommendations for corrective action?

Mr. MARTIN. No.

Senator LEVIN. It exists as far as you are concerned?

Mr. MARTIN. It clearly does and we used it that way.

Senator LEVIN. All right. Just one question, I was curious about an article that appeared last week, an Anderson and Spear article where you made comments about Attorney General Meese.

Were you accurately quoted in that article?

Mr. MARTIN. No, not accurately. I guess it is hard to get an accurate statement into the newspapers these days.

Senator LEVIN. I do not want to get into it now too much, but would you submit for the record the accurate statements that were made? I think that ought to be clarified somewhere.

Mr. MARTIN. You would like to have that? Well, I was very generous to the Attorney General in terms of the good things he has done in the Department of Justice and——

Senator LEVIN. Well, either way. But can you submit for the record where that is inaccurate and what you said? I think it would be useful, because that got a lot of publicity.

Mr. MARTIN. I will certainly do that for you.[5]

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[5] Material referred to not received at time of printing of hearing record.

Senator LEVIN. Thank you.

Mr. Martin, we appreciate your coming by. If it is all right, we will have some additional questions for the record. You are not obligated to answer them. You no longer work for the Government, but if you have a few extra minutes, we would appreciate it.

Mr. MARTIN. I feel I have a public duty. I have a very fond feeling for the Ethics Office and I hope to see it treated fairly and I certainly would do it.

Senator LEVIN. Thank you. I know they appreciate it and we do too.

Our last witnesses are a panel; Kathleen Buck, who is the Designated Agency Ethics Officer, the DAEO, and the General Counsel of the Office of the Secretary of Defense; and Joseph Shine, who is the former DAEO at the General Services Administration and currently the Chief Deputy Attorney General of the State of South Carolina.

We welcome you, Ms. Buck, and you, Mr. Shine. If you do not mind, we would appreciate moving directly to questions, but you may want to just make a few comments. If you do, please feel free to do so.

Ms. Buck, would you like to start?

TESTIMONY OF KATHLEEN A. BUCK, DESIGNATED AGENCY ETHICS OFFICER AND GENERAL COUNSEL, OFFICE OF THE SECRETARY OF DEFENSE [6]

Ms. BUCK. Yes, sir. All I would like to say is that the Department of Defense wholeheartedly supports the reauthorization of the Office of Government Ethics, and to state that I believe that we have enjoyed an excellent relationship with the Office of Government Ethics and appreciate very much the support they have provided to us over the years.

Senator LEVIN. Okay. Thank you.

Mr. Shine, would you like to briefly make a comment before questions? You have come a long way. Please feel free to do so.

TESTIMONY OF JOSEPH D. SHINE, FORMER DAEO AT THE GENERAL SERVICES ADMINISTRATION, CURRENTLY CHIEF DEPUTY ATTORNEY GENERAL, STATE OF SOUTH CAROLINA

Mr. SHINE. Thank you, Mr. Chairman. I certainly would like to take a few minutes. I appreciate my full statement being made a part of the record.[7]

Senator LEVIN. It will be.

Mr. SHINE. First of all, I would like to have an additional matter included. I prepared an article a couple of years ago, giving a perspective on Title XVIII of the United States Code, Section 207[g], which deals with the obligation of partners of current Federal Government officials. This is to be to be included as part of the record.

Senator LEVIN. That will also be made a part of the record.[8]

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[6] See p. 245 for Ms. Buck's prepared statement.

[7] See p. 250.

[8] See p. 323.

Mr. SHINE. Yesterday you referred to the OGE pamphlet instructing Federal employees about ethics and I would like to share with you GSA's effort in this area called Practical Ethics. It is our attempt to instruct our own employees regarding their obligations under the standards of conduct.

Senator LEVIN. Thank you. We will also receive that.

Mr. SHINE. Some questions have been raised about the vulnerability of a designated agency ethics official in carrying out his or her duties under the Ethics in Government Act, and the regulations promulgated by the Office of Government Ethics. I would like to share with you some comments I have in that regard.

I have indicated in my statement that the position of DAEO is a very vulnerable one. If you are a GM/GS attorney advisor serving as DAEO, you have no civil service protection or tenure. All GM/GS attorneys in the Federal Government, including the very fine lawyers at the Office of Government Ethics serve with excepted appointments, even though they may be considered "career," they are still excepted service appointments.

In fact, recently the Supreme Court in a court decision reaffirmed in a decision handed down on January 25, 1988 in *United States* vs. *Fausto*, no provision of the Civil Service Reform Act gives non-preference members of the excepted service the right to administrative or judicial review for suspension for misconduct. So there is very little protection under our current civil service laws for these excepted appointments who are not veterans.

Your job security does not have to be threatened directly or indirectly. You realize if you displease the boss by taking strong actions you may find yourself exiled—and this is figuratively speaking—to a Siberian gulag; in other words, isolated.

What is left for the DAEO is to be fortified by his or her personal sense of ethics to do what is right. Not everyone can afford to take a personal stand, like several top officials recently at the Justice Department, and resign his or her position as a matter of conscience or protest.

Most agency ethics officials at the working level—not political appointees—are career public servants. This Subcommittee has an obligation to propose legislation that would protect these servants of the public trust from reprisal, actual or implied. If we are to have a Federal Government that has credibility, integrity and the respect of the American people, then agency ethics officials and their staff must be protected from the winds of political expediency.

Presently, OGE has no such authority to insulate the DAEO from being replaced by the head of an agency. Statutory authority, not regulations, that could be considered by some aspirational in nature, is needed to provide the necessary remedial relief. The establishment of a permanent corp of DAEOs, removal only for good cause, would go far to protect the needed independence of judgment and action.

This independent corp of DAEOs would operate much like administrative law judges. Administrative law judges are part of the agency. They are agency employees. They are selected from a register. They have to compete for these positions. They have to show some pre-qualifications, meet some standards that would qualify them to become administrative law judges.

So we have a model, a very workable model, from which agency employees can be selected to perform the obligations and responsibilities of DAEO, and still be a part of the agency. I suggest that the appointment, tenure and evaluation of the DAEOs come from the Director of the Office of Government Ethics. The DAEOs should be members of the Senior Executive Service because sufficient status is necessary and required in their dealings with top level Federal Government officials, including heads of major Federal agencies and heads of major departments.

Thank you very much, Mr. Chairman, for your indulgence.

Senator LEVIN. Thank you.

I understand, Ms. Buck, that you must leave so we are going to ask you a few questions first, if that is all right with both of you.

Would you comment on what Mr. Shine just said? Would you have any objection to that approach to DAEOs that he has just outlined?

Ms. BUCK. Yes, sir. I do object to that approach. Within the Department of Defense, to my knowledge, I believe all of our DAEOs are general counsels of the various components. I think that is a system that has worked exceedingly well within the Department of Defense. I am not aware of any problems coming up where anyone tried to exert, as Judge Nebeker said earlier, command influence on the decision making of the DAEOs.

Senator LEVIN. Isn't it a lot more subtle than that, though? Isn't there a feeling of vulnerability that necessarily must exist inside somebody who is part of an agency which they are in effect judging?

Ms. BUCK. I think it is a heavy responsibility but it is not that different, really, than some of the other very difficult decisions that we lawyers have to make every day within the Department.

Senator LEVIN. Can you give me an analogy to the kind of decision you make every day where you are judging your own agency?

Ms. BUCK. Well, I think that we judge any variety of things within my own office. That can range on everything from approval of military operations that, of course, are being——

Senator LEVIN. Is that a judgment of your own agency, though?

Ms. BUCK. It is a judgement on actions——

Senator LEVIN. It may be difficult and complex, but are you really judging the——

Ms. BUCK. I think to the extent that you are saying that the people problems are very, very difficult ones, I certainly think that is true. But in terms of pressures, we make very difficult decisions every day that have similar set of pressures.

I think that that is a system that has worked very well, having the general counsels do that job. Because I would hope that they are a group of people who have a great deal of will power and backbone and are prepared to make those tough decisions, even if they are unpopular.

Senator LEVIN. How long have you been the DAEO, by the way, at DOD?

Ms. BUCK. Well, I was a DAEO for the Air Force, so since 1986. And before that, since 1981 I have been working on standards of conduct issues because I was the Assistant General Counsel for the Office of Legal Counsel in the Department of Defense beginning in 1981 and also worked these issues for the Department.

Senator LEVIN. Within that experience, how many times has the OGE ordered corrective action with regard to an ethics matter, that you know of?

Ms. BUCK. Well, the Office of Government Ethics has done about fifteen major inspections over the last several years and certainly as part of those inspections they would have made many recommendations. I do not know whether we have gotten to the point where we start arguing about whether it is an order or not. I believe within the Department we have accepted those recommendations and we have a great deal of faith in what the Office of Government Ethics does recommend and we follow those actions.

Senator LEVIN. Has there ever been an occasion you know of where you disagree with the recommendation of the OGE at the end of the game?

Ms. BUCK. At the end of the game?

Senator LEVIN. The end of the line, yes. Where they have recommended one thing and you have said no, or where your agency has said no?

Ms. BUCK. I am not aware of any, quite frankly. During that process, of course, there can be negotiations where there may be some compromises on both sides. But I am not aware of any specific instance where that happened.

Senator LEVIN. Can you, on a slightly different subject but it is related, tell us about the DOD's efforts in the area of enforcing post-employment restrictions? I think DOD is actually one of the few agencies which makes an effort to enforce those restrictions, particularly the one-year no-contact restriction which we enacted in the Ethics in Government Act.

Can you tell us how that is working?

Ms. BUCK. Yes, sir. As far as I can see, I think that it is working pretty well. We, of course, have set up a new standards of conduct office within my department with one of the responsibilities for that office being that subject, to ensure that reports are sent out for people to be filled out and they are sent back in. And so we have an overall oversight responsibility there also for the whole Department.

I think the people are taking this responsibility seriously, that we are getting these reports in. It is somewhat difficult to tell right now how effective they are. You know, it takes a while, once a law is passed, for us to have an appropriate time period where we can do what we think is a very good survey to look at the issue of effectiveness. But I think that one of the things that it has done clearly is to heighten the sensitivity of all of the officials within the Department of Defense to be sensitive to conflicts of interest and I think that it has done that.

I think it has accomplished that goal and, of course, I think that you were one of the people primarily responsible for the new legislation in this area and I think it has been a good thing for the Department.

Senator LEVIN. My final question of you, and then we will excuse you because I know your scheduling problem.

The OGE has issued post-employment conflict-of-interest regulations but has not yet issued regulations for the other conflict-of-interest statutes. Some DAEOs have said that a number of key terms in the other conflict-of-interest statutes are in need of clarification, such terms as "particular matter," or "negotiating for employment," in section 208.

Do you believe those terms need clarification and should the OGE issue regulations defining those terms?

Ms. Buck. Within the Department of Defense we have issued interpretations, because of necessity, on those terms. I do not think that we would certainly object to the Office of Government Ethics going ahead and issuing definitions. I would assume that we would have an opportunity to comment on any definitions that would be issued.

I would not object to that but I do not see a burning need for it.

Senator Levin. Do you know how many other agencies have issued those kind of internal regulations?

Ms. Buck. I would assume that—I do not know specifically—but I would assume that all of the major agencies have done that. And on a daily basis, quite frankly, we consult with the Office of Government Ethics on these kinds of issues so I think that we have a very good process of consultation going on regularly.

Senator Levin. There is one additional question that I have and that relates to the testimony which you submitted and which will be made part of the record, by the way, as will Mr. Shine's of course. But the testimony that you have presented to us paints a very positive image of both OGE and the DOD ethics program.

The DOD ethics program, however, has not always been free of problems. A November 1985 review of the Office of the Secretary's program by the Office of the General Counsel, described the standards of conduct management as, "not only fractured, understaffed, but conducted on low-priority level."

And a February 1987 DOD IG report also criticized the lack of coordination, uniformity and oversight within the DOD ethics program.

Can you tell us what improvements have been made in the DOD ethics system and what specific role did OGE play in correcting the deficiencies in your system?

Ms. Buck. Well, I think that during the past 18 months we have been in the process of putting together this new standards of conduct office, so we have staffed the office now and it has been in place for several months now and I think that it is operating on a much better basis.

I would hope we would get a better report card on our office at this point in time.

Senator Levin. Could you give us a list for the record of the specific changes that have been made in the ethics system at DOD following these reports?

Ms. Buck. Well, we have issued a revised——

Senator Levin. No, I mean could you provide it to us in writing and we will make that part of the record.[9]

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[9] See p. 378.

Ms. BUCK. Yes, sir. Certainly.

Senator LEVIN. Thank you, Ms. Buck.

Ms. BUCK. Thank you, Mr. Chairman.

Senator LEVIN. We appreciate you coming.

Mr. Shine, I do not know what schedule you are on.

Mr. SHINE. I am at the pleasure of the Subcommittee, sir.

Senator LEVIN. Thank you. From your testimony it is obvious that you are strongly committed to the improvement of the Federal ethics system and you have a lot of knowledge and experience, indeed, that you bring to bear on the issue.

What is very compelling in your testimony is the potential which you have identified, if not the actuality, of retribution against agency ethics officials. To your knowledge, have any ethics officials actually been fired, transferred, or otherwise reprimanded, or was there any threat of such action for doing what they felt was their job?

Mr. SHINE. In direct response to your question, I have no personal knowledge of such actions. For me to repeat rumors, and unsubstantiated rumors at that, which I have no way of supporting, or backing up such assertions, I think would be a disservice to this Subcommittee.

I can only recall offhand one incident reported in the newspaper regarding the General Counsel at the Tennessee Valley Authority. There is some dispute as to recommendations he made to the Authority, in his role as a DAEO, these recommendations relate to the conflicts of interest, that he perceived at the time at the Tennessee Valley Authority.

I think the Office of Government Ethics was very much involved in that matter, and it can perhaps give you more of a background as to circumstances. The TVA situation comes to my immediate mind as an example.

Senator LEVIN. Do you base your testimony and recommendations on what you believe is inherently defective in the system, or is it based on the reports that you have either gotten or read about, or both?

Mr. SHINE. Well, I guess both. Essentially, I view the need to protect DAEOs from a management perspective in terms of controls to protect the system from abuse. In other words, you do not want to have a structure created where the payroll clerk who is responsible for preparing the payroll is also being the disbursement clerk for the company. I am not saying that the payroll clerk would be unethical or be a thief. But certainly, you want to lessen the potential for that happening.

So is the case with having some built-in protections for the DAEO so if there is any implied threat to a DAEO in carrying out his or her responsibility, that there are safeguards built in the system to keep that from happening.

You do not want to have a situation where we wait for an incident to take place. I mean, if you can prevent the incident, then you take protective measures. So I am really advocating taking protective measures, providing inherent safeguards so that we do not have a situation where a DAEO is actually fired and we have a Washington Post story and a Subcommittee investigation.

My whole thrust is to prevent that from happening so that we will not get to that point.

Senator LEVIN. You have argued that because of the appointment of the DAEO by the agency head, that he or she is not independent. Fundamentally there is just an inherent problem, basically.

The OGE maintains that DAEOs should be agency employees appointed by the agency head in order to ensure that they obtain the necessary cooperation from agency officials.

Is there some way that you can think of in which the DAEOs can remain agency employees but be given certain protections from retribution? Or do we have to just simply cut the knot totally?

Mr. SHINE. Certainly. I have made such a recommendation. I have given you an illustration where we have an existing model of administrative law judges or administrative judges. They are certainly agency employees and they are given certain civil service protections in terms of review, in regard to suspension or removal.

What I am saying essentially is extending those same rights to DAEOs, particularly attorneys who are DAEOs, and who are not covered by the civil service rules. Give them also that kind of protection so if there are improper personnel action taken against them, that there is some forum that they can get internal administrative reviews. Right now there is very little administrative or judicial review available to attorneys who are DAEOs or who are working in the ethics area.

Senator LEVIN. You said particularly attorneys who are not covered by civil service——

Mr. SHINE. Well, all attorneys who are GM or GS, and not members of the Senior Executive Service, are not given the full protection of career civil service employees.

Senator LEVIN. Are you saying that is the biggest problem or that we only have to worry about that? Or should we worry about DAEOs whether or not they are protected by civil service rules?

Mr. SHINE. Well, I think you need to worry about both. I believe that it should be made clear that DAEOs have certain protections and status that is recognized just beyond that instance. I only gave a situation, the attorney-advisor, as an example where there is a major deficiency in my view. But I think it goes beyond that. DAEOs as a group should be given this protection and made clear that they have this independence.

If not, again I would like to point out, the general counsels of the component parts of DOD are all political appointees. So you can expect that they will be team players if they want to continue their appointment in service to the Administration.

Senator LEVIN. Talking about political appointees, should they be required to attend an ethics briefing before their confirmation and should the OGE, in your opinion, sponsor that briefing?

Mr. SHINE. Absolutely. It is very difficult to get a political appointee to attend an ethics briefing once they have taken the oath of office. They are often very busy with other demands. Other issues take more precedence over attending a briefing on ethics. Certainly you can get their attention before they are confirmed.

And the reason I feel that it should be sponsored by the Office of Government Ethics is that——

Senator **Levin**. Instead of the agency. Why the OGE instead of the agency?

Mr. **Shine**. Because I think they would listen more to an independent Office of Government Ethics, particularly if you are a head of an agency coming in. These are all going to be your subordinate employees and you come in with an agenda, and you are going to be giving marching orders and I think an independent organization like OGE can say, now, listen, these are the kinds of things that you are expected to do as a Government official. I think you get more attention.

Now, not that that process of giving seminars could not take place within the agency, but I think at least initially getting the attention of that appointee from the OGE I think will—you will definitely get more of a reaction and paying attention to it, especially in the nomination process.

Senator **Levin**. Do you know why that training is not being given now?

Mr. **Shine**. By the Office of Government Ethics?

Senator **Levin**. Or either way?

Mr. **Shine**. Well, I attempted at GSA to provide an interview with each appointee coming into the agency.

Senator **Levin**. You what?

Mr. **Shine**. I have provided interviews. In other words, it was not a formal seminar, but one-on-one meetings where I discussed agency policies in the standards of conduct area. And what I am suggesting is that it be formalized.

Senator **Levin**. I see. We have Judge Nebeker here. Maybe we ought to—if we can do this informally, since we are into this subject, do you have a reaction to that suggestion that the OGE give all political appointees an ethics briefing prior to confirmation? We might as well get the answer from you and cut this short.

Judge **Nebeker**. Mr. Chairman, I believe attached to my formal answers to your written questions is a letter, an exhibit that I drafted and that we send out. That is a mighty brief briefing. Whether something more structured could be done again depends on resources.[10]

There is no question but that during the confirmation process you can get the full and undivided attention whereas afterwards, the substantive duties are such that an ethics briefing is sort of like reading the Articles of War to a group of troops. It is a boring exercise they really do not want to go through.

Senator **Levin**. Thank you, Judge. I did not mean to pull you back into this thing.

Judge **Nebeker**. That is all right.

Senator **Levin**. Just finally, if you would, Mr. Shine, the overall opinion that you might share with us of the Federal ethics system, and OGE performance in particular.

Mr. **Shine**. Well, given the limited staff resources, I believe OGE has done a very good job. What I think OGE requires is good leadership, and I think in Judge Nebeker you have that.

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[10] See p. 302.

I feel there are several areas of improvement. One, having an independent Office of Government Ethics. I think that is crucial.

Two, you should not stop there. The people that are on the front lines in dealing with ethical issues on a day-to-day basis, the agency ethics officials need to have strong statutory support protecting that position, describing where they should fit in within the organization. Right now there is no standard. An ethics official could be a personnel officer if that is the desire of the agency head.

So I think there should be some more uniformity in where and who should be responsible for the ethics program of any agency. As the good Judge mentioned in his testimony to you this morning, the DAEO can be any number of officials and I feel that, including political appointees, his allegiance is to the Administration, Democrat or Republican.

So I feel you need to have some professionalism involved in terms of a career DAEO who has prerequisite training, pre-qualification, education, and experience that will enhance the effectiveness of the ethics program for our country.

Senator LEVIN. Mr. Shine, we appreciate your returning to give us your experience and recommendations. This is very helpful to the Subcommittee. There is a possibility that we might have some additional questions for you which we would appreciate your answering. You are not obligated to but if you have the time, we would appreciate it.

Mr. SHINE. Certainly. I appreciate the opportunity to appear before you, Senator, Mr. Chairman.

I only want to leave one recommendation in parting, and that is the way the recusal system is being handled. I strongly feel that an action plan implementing the recusal agreement of a nominee should be established in writing before the confirmation takes place.

Senator LEVIN. An action plan? What is that?

Mr. SHINE. Yes. In other words, if an appointee is required to submit and agree to a recusal because of potential for conflicts of interest, actual or apparent, then a plan of action implementing that agreement should be established.

Senator LEVIN. Are you saying that the agreement now does not have the action plan as part of it?

Mr. SHINE. No, sir. And I give an example in my testimony, a hypothetical situation where the actual plan of implementing the recusal agreement takes place after the appointee comes to the agency, and I am saying that that should not be, that this committee, if it is a committee considering the nomination of a political appointee, should be able to examine and question the DAEO, the appointee, the Office of Government Ethics as to what resources will be devoted to implementing that recusal agreement, and have it in writing that this is what you are going to do.

Because once the appointee comes to the agency, it takes a lower priority. The appointee has other pressing needs and matters to attend to and I think this is the only way that you can assure yourself that the recusal agreement will be effectively implemented, by having it agreed to beforehand, again, when you have the direct attention of the nominee during the confirmation process.

Senator LEVIN. Real good. Thank you.

Mr. SHINE. Thank you, sir.

Senator LEVIN. Mr. Shine, again, we are grateful to you.

If there are no further questions, we will stand adjourned.

Thank you all.

[Whereupon, at 12:15 p.m., the Subcommittee adjourned subject to the call of the Chair.]

APPENDIX

TESTIMONY OF ARCHIBALD COX

CHAIRMAN

COMMON CAUSE

Mr. Chairman, I appreciate the opportunity to appear before your Subcommittee to give you the views of Common Cause and my own thoughts on 10 years of governance under the Ethics in Government Act.

May I also say, Mr. Chairman, that you and the Subcommittee show much wisdom in scheduling broad hearings upon ethical standards in government at this time. We have come to a dangerous crisis. The nation's headlines are filled with news of corruption and moral decay, not only in Washington but in financial centers. Unless we -- all of us -- act promptly to arrest the decline it will be too late. The challenge now is to restore faith in public service, to infuse dignity, respect and impartial concern for the general public interest into the conduct of government not only by officials in the Executive Branch but also by our elected representatives in Congress. For similar reasons, I ask your indulgence to put the problem in a larger, perhaps even a philosophical, context before addressing particular questions of a legislative kind.

I. THE PUBLIC PHILOSOPHY

For the past year we have been celebrating the Bicentennial of the signing of the Constitution of the United States. If the Framers could look upon us today, they would doubtless find much to envy and a good deal of which to be proud; but if they were to focus upon the attitudes dominating the way in which public business is conducted in Washington, surely the Framers would be sadly depressed. The Framers were not unaware of human frailty, but they sincerely believed, taught, and strove to practice the philosophy that public office is held not for personal advantage but as a public trust. Conditions today were recently summarized in a New York Times editorial captioned "A Year of Shame":

> "Whether measured by the rank or the sheer numbers of officials who have come under ethical suspicion and criminal investigation the amount of sleaze is awesome."

The Under-Secretary of Commerce negotiates for a highly-paid executive office in the corporation to which he is also negotiating a sale of government satellites. A Counselor to the President presses for high-level government office the names of men who have won his favor by bailing him out of personal financial difficulty. To help the Counselor win confirmation as Attorney General, the Director of the Office of Government Ethics overrules the staff attorneys and discovers that the executive order prohibiting such conduct is purely aspirational. The unfolding story of Wedtech presents a depressing picture of the way in which entrepreneurs turn to campaign contributions, peddlers of personal influence, and the intervention of "insiders" corrupted by money or personal association in order to receive lucrative government contracts with scant regard to the public interest. High-level White House officials, as well as former Members of Congress, rush to trade their connections and influence for spectacular fees. A former White House Deputy Chief of Staff is convicted of lying to a grand jury about his "insider" lobbying. Individual Senators and Congressmen daily exchange influence for torrents of campaign money.

Other activities, although not motivated by personal greed, would be equally depressing to the Framers. A former National Security Advisor, one of the highest White House officials, pleads guilty to having deliberately lied to the Congress. A President, while proclaiming and pressing upon our allies a national policy not to exchange money or arms for hostages, secretly seeks to accomplish the very sort of exchange he condemns. Other high officials just below the President are found by congressional committees to have diverted to the Contras in Nicaragua millions of dollars of government money generated by the secret sale of arms to Iran in deliberate disregard of the prohibition against such aid in the Boland Amendment. Nor should we forget that not many years ago other officials high in the White House, including the President, manifested their contempt for the rule of law.

The erosion of old standards is too plain for further elaboration. In my opinion these and other instances of "sleaziness" and also of disregard for law are both cause and consequence of the decline of the public philosophy that shaped American political ideals and long influenced American political life. The ethical standards supposed to govern public officials are derived from that philosophy. Upon it -- or something very like it -- not only our constitutionalism but the government of any free society must ultimately rest.

The Framers of the Constitution, their contemporaries, and those who came after them in the nineteenth and much of the present century had the deep sense that they were engaged in a unique adventure binding them all together, binding each generation not only to its parents and grandparents from whom the adventure was inherited, but also its children and to their children to whom the torch would pass. The adventure was open to all who came here, with the cruel exception of the African slaves; but it was also one to which all owed a duty to contribute. The adventure moved forward and would continue, even though progress was slow, there were setbacks, and the goals could be perceived only dimly.

The sense that this was a uniquely American adventure grew out of the colonization of a new world and the American Revolution but the dominant themes run back through the history of western civilization. The Founders, drawing upon natural law as expounded by Rousseau and John Locke, by St. Thomas Aquinas, and by the Stoic and Hellene philosophers, believed that man is by nature a rational and social being; that the growth of each individual towards responsibility and the freedom to choose the best that he can discern is a purpose which must never be conditioned by or made subservient to other purposes; that there is at all times and in all ways an ideal fitness of things which corresponds to those beliefs; and that by ourselves and working with others we are bound to do what we can to see that this fitness prevails in human affairs.

Two aspects of this public philosophy especially relevant to government are emphasized in Plato's poignant description of the last hours before the death of Socrates in which Socrates steadfastly refused even to walk to freedom out through the door deliberately left open by his jailor. "The Athenians have thought fit to condemn me and I have thought it better and more right to remain here and undergo my sentence," even though "these muscles and bones of mine would have gone off long ago ... if they had been moved only by their own idea of what was best, and if I had not chosen ... the better and nobler part." The civilized man prevailed over the urge of "these bones and muscles," the baser and acquisitive powers. The civilized man would not cheat the law for personal advantage, even to preserve his own life, because, if Athens were to be governed and Athenians were to be free, the government must be by citizens whose better natures prevailed and who put the law above their own welfare. It is the same with us.

Socrates spoke of the citizen's duty to freely comply with the laws. The philosophy laid upon those chosen or appointed to govern not only that duty but also the further obligation in governing to suppress the demands of "these bones and muscles," to play "the better and the nobler part," and to pursue only the common or public good. I do not mean to suggest that either the Framers or later generations before our times believed that public men would always play the nobler part or that the ideal fitness of things would soon be achieved. The Framers, like the Greeks, knew human frailty and still aspired to the nobler part. The ideal provided a code of behavior for public men. The code shaped their conduct by defining their expectations of themselves and also the general public's expectations of them. And while our political history tells of frequent corruption, sometimes on a giant scale, as in the Grant and Harding administrations, and sometimes in lesser shortcomings, as in the Truman and Eisenhower years, there had always been enough prominent public figures who lived by the code to keep the ideal alive and the code a reality. One thinks first of the examples of Washington, Jefferson, and the Adamses in the beginning, and of Henry L. Stimson and George C. Marshall in the present century, but there were thousands more here in the Senate and in the House, and at all levels in the Executive Branch.

It is important to emphasize the reciprocal relationship between the ideals and conduct of those who make and administer the laws, on the one side, and the ideals and conduct of the citizens, the public, on the other. A free society depends upon a high degree of mutual trust. The public will not give that trust to officials who are not seen to be impartially dedicated to the general public interest, nor will it give trust to those high in government who violate the rule of law they ask citizens to obey at the expense of self-interest, or to those who present government as the place where one feathers his own nest, exchanges favors with friends and former associates, and takes good care of those who provide the campaign contributions for the next election.

In my opinion, this decline in the public philosophy upon which our political institutions rest is both cause and consequence of the record of sleaziness and official disregard for law that deeply troubles the American people because they sense that it threatens our institutions. The decline of the philosophy is cause in the sense that the conduct of government business depends on it. You cannot establish high ethical standards by legislation alone. The code by which each Senator, Representative, and other public official judges himself or herself, and the code to which the public expects her or him to conform, will do more to govern individual conduct than all the statutes in the U.S. Code. Laws can help, for reasons I shall state in a moment, but laws alone are not enough.

The decline in the philosophy is the consequence because gifts, lavish entertainment, arrangements for financial help, large honoraria for small speeches, all-expense-paid trips of inspection or for appearances at conventions in vacation spots, and the influence-peddling of the Deavers, Nofzigers, and former Members of Congress all have a subtle, insidious effect upon the way in which public officials look upon their functions. I should be less than candid if I did not include giving preferred access, which is influence, in return for large campaign contributions from PACs and other special interests. Paul

Douglas, one of the truly great Senators of the 1940s and 1950s, put the point best in speaking of much smaller favors than those that have become common in the 1980s:

> What happens is a gradual shifting of a man's loyalties from the community to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good. Throughout this whole process an official will claim -- and may indeed believe -- that there is no causal connection between the favors he has received and the decisions which he makes. He will assert that the favors were given and received on the basis of pure friendship unsullied by worldly considerations. He will claim that the decisions, on the other hand, will have been made on the basis of the justice and equity of the particular case. The two series of acts will be alleged to be as separate as the east is from the west. Moreover, the whole process may be so subtle as not to be detected by the official himself.

I do not mean to suggest that the public philosophy of which I speak and high ethical standards will inevitably collapse whenever there are shortcomings. Within my memory we have survived not only the great wrongs of Teapot Dome and Watergate, but also the Bobby Bakers and Sherman Adamses. What does most to preserve the philosophy when breaches of the code occur are the examples and voices of those who stand for "the better and nobler part" subduing "these bones and muscles."

No voice is more important than that of the President of the United States. Sadly, even though there are lists of more than a hundred officials in the upper echelons of government who have conducted themselves in ways that gave rise to substantial charges of ethical or criminal misconduct, and many of whom have been forced to resign and even convicted, still not a word of disapproval has come from the Executive Office. On the contrary, we are told that the criticism of influence-peddling by Michael Deaver is just a result of jealousy of his successes or political antagonism. Men found by the Select Investigating Committees of the House and Senate to have schemed to violate the nation's laws and deceive the public are hailed as heroes.

Other voices that might have been strong in preserving the public philosophy are here on Capitol Hill. Yet the House of Representatives hesitates to deal with serious evidence of ethical violations by its Members. The House Ethics Committee has ruled that if a Representative who has accepted grossly improper payments in violation of ethical standards returns them after he is caught, then no further action is warranted.

It is imperative, Mr. Chairman, that the Senate and the House of Representatives raise their voices in leadership now. Laws alone may not preserve the ancient philosophy that public office is a public trust, but statutes and Executive Orders codifying ethical standards serve three purposes.

First, they may particularize the philosophy, revealing in careful detail how it should operate in various situations. 18 U.S.C. §207 of the Criminal Code and the provisions of Executive Order 11222 are examples.

Second, the Senate and House of Representatives speak most effectively in legislation. The very enactment and improvement of ethics laws build the philosophy by affirming it.

Third, so long as we are subject to human frailty there will be violations. Public enforcement whenever there are violations vindicate not only the laws but the public philosophy, and so strengthen both.

Consequently, Mr. Chairman, I turn next to the specific questions with which your Subcommittee must deal: What can be done to strengthen the existing legislation in this area, specifically the Ethics in Government Act of 1978? How can the administration of the Act by such government agencies as the Office of Government Ethics be improved?

II. ETHICS IN GOVERNMENT ACT

> Codes of conduct should be crafted from a rich empirical base, understandable in the climate of the particular agency, making sense to those to whom they apply -- down-to-earth, realistic. They should not appear as commandments from on high, generalized statements of good intentions, lofty aspirations incapable of specific human responses. They need to be fashioned out of the everyday work life, become integral parts of staff development activities; a support to effective performance, not a burden. The goal is to underscore that the standards of honesty go hand in hand with those of efficiency and competence.
>
> --Robert C. Wood

A. PROTECT THE FINANCIAL DISCLOSURE PROVISIONS

At the heart of the Ethics in Government Act of 1978 is the requirement for public financial disclosure. Over the course of some 10 years of experience under the Act, the disclosure provisions have proved to be reasonable and balanced and, on the whole, to have worked well. On the average, 12,000 disclosure forms are filed yearly with little commotion. It appears that, for the most part, disclosure requirements have become an accepted part of public service.

Yet, some have claimed that financial disclosure is burdensome and provides a strong disincentive for entering government service. In our view, however, no credible evidence has been advanced to support the claim that financial disclosure requirements have in any significant way discouraged otherwise willing individuals from entering government service or caused quality personnel to leave federal service.

The Ethics Act carefully balances the rights of the public official against the disclosures necessary to guard against conflicts of interest. The congressional draftsmen, as urged by Common Cause and others, decided not to require disclosure of income tax returns. Reporting in categories of value, as the statute requires, avoids the unnecessary disclosure of net worth and specific values while giving a clear indication of the magnitude of each holding. Just as Common Cause fought strongly against requiring too much disclosure from public officials, so we will continue to fight just as hard to prevent too little disclosure of what the public needs to know. Changes proposed by Reagan Administration officials and by a recent report by the Kennedy School of Government at Harvard University would gut the disclosure law by limiting the type and scope of disclosure to the detriment of the public interest. We strongly urge the Congress to reject all efforts to weaken the financial disclosure provisions in the Ethics in Government Act.

1. Oppose "confidential" disclosure

Common Cause is strongly opposed to any attempts to weaken the Act by requiring only confidential disclosure. Under the confidential disclosure system that was in effect before 1978, some officials were required to disclose financial information with their agency but no information was made public. By reason and definition, "confidential" disclosure is not disclosure at all.

Making the information available to the public and to the press and other watchdogs of the public interest serves three vital interests. First, the officials making disclosure pay more attention to complying fully and accurately with the Act. Second, Designated Agency Ethics Officials are made more diligent in advising officials of potential conflicts of interest and in dealing with violations of ethical standards. Third, the officials guilty of intentional or unintentional violations may be brought by publicity to take corrective action.

It should be remembered that it was public disclosure of Attorney General Edwin Meese's "limited blind partnership" and of Attorney General William French Smith's $50,000 severance arrangement from a firm in California that raised serious questions about the impropriety of such arrangements.

General Accounting Office (GAO) studies before the passage of the Ethics Act found widespread non-compliance with existing conflict of interest regulations under the system of confidential disclosure then in effect. A follow-up study by GAO found that the mere fact that disclosure documents are public information encourages individuals to be more accurate in completing the reports. Public disclosure is an action-forcing mechanism for agency ethics officials and others actively to apply the law. In short, public disclosure forces the law to be taken seriously.

2. Oppose limitations on information to be disclosed

Common Cause opposes proposals that would significantly weaken financial disclosure by requiring disclosure only of the identity of the financial interest without having to specify value or by simply requiring two categories of value -- one over $10,000 and one under $10,000. The legislative history of the Ethics Act underscores the need for a sufficient number of categories of value to reflect the magnitude of the holding and thus the potential magnitude of a conflict of interest. Categories of value, such as those contained in existing law, are necessary for the public, the press and the Office of Government Ethics (OGE) to discern the significance of the holding or transactions being disclosed. Attorney General Smith's severance fee takes on special significance when one knows that the amount was more than he made during the entire six years he served on the firm's board of directors.

3. Oppose elimination of public disclosure for top-level civil servants

For many of these same reasons, Common Cause also opposes efforts to eliminate public financial disclosure by career civil servants covered by the Act. Top-level civil servants -- GS-16 and above, the so-called "supergrades" -- often exercise as much decision-making responsibiity as some political appointees. And because the public spotlight is much less focused on career employees, public disclosure to protect against conflicts of interest is clearly needed.

4. Increase training for Designated Agency Ethics Officials for reviewing disclosure statements

There should be more emphasis on training Designated Agency Ethics Officers to review accurately the disclosure statements and to counsel employees regarding potential conflicts. OGE itself must have the trained staff to review those statements it receives. This is particularly crucial during the presidential transition period. Current practice is to schedule Senate action on a presidential nominee only after the appointee's financial disclosure statement has been approved and signed by the Director of OGE. Therefore, OGE should be prepared to review disclosure statements of presidential nominees thoroughly yet expeditiously to ensure a smooth transition.

B. STRENGTHEN THE "REVOLVING DOOR/POST-EMPLOYMENT" PROVISIONS

The growth and spread of "revolving door" abuses is one of the chief causes of concern in the current crisis, Mr. Chairman, and an evil which legislative changes can do much to alleviate. In speaking of the "revolving door," I describe the practice of leaving positions of power and influence in government only to return immediately to the same circles as a lobbyist or other representative seeking favorable action on behalf of some private interest from the very subordinates or associates with whom the ex-official used to deal. The evil takes four forms:

> 1. The official, while still in office but thinking of work as a lobbyist, will be tempted to curry favor with prospective employers or clients.
>
> 2. The ex-official will find it all too easy to use inside information not available to others for the benefit of his private employer or client.
>
> 3. The ex-official will often be able to trade upon habits of deferring to his advice and wishes engendered during the days when he was senior to, or at least a more influential official than, those with whom he now deals in a different capacity.
>
> 4. At best, the insidious influences described by Senator Paul Douglas come into play. The ex-official lobbyist comes as a friend, an insider, a "player" or "actor," in the current jargon. At a minimum, he gets a little different hearing or preferred access. That advantage alone may make the difference. No party to litigation or lawyer would be willing to have the judge hear only the evidence and argument of the other side, still less to have them heard alone in chambers. And with the hearing, the risk of the influence of friendship, common political interests, and reciprocal back-scratching grow.

I wish, Mr. Chairman, that I had the words in which to express the depth and intensity of my disagreement with those who are now arguing that the "revolving door" is a public blessing -- that there are public benefits in allowing public officials to leave the public service in order to turn around and the very next day lobby, on behalf of some private interest, the very same people who were their associates and even subordinates the day before. Of course, there are values in attracting to government men and women with practical experience in the private sector. Of course, there are benefits not only to private enterprise but also to the general public in having men and women with government experience bring to the private sector a better understanding of government and a public point of view. And I can agree, because of my own happy experience, that moving back and forth from one sphere to the other can be "enriching" in one sense of the word. But I can also testify from experience that the country can have all those benefits without the kind of "enrichment" that results when an ex-official goes back as an "insider" to use the knowledge and influence of his former position among the very same people who he used to direct or with whom he used to work. There are plenty of other posts in the private sector, including private industry, to which the departing government official may go. There are many other things he can do without immediately going back to lobby the government. Nor should it be forgotten that we are talking about suspending full freedom to lobby anywhere and anyone for only very short periods of time.

In stating his support for the Ethics in Government Act, President Jimmy Carter noted that, in spite of existing laws and regulations, all too often public officials "have come into government for a short time and then left to accept a job in private industry, where one of their primary responsibilities is to handle contacts with the former employer." He believed the Ethics Act's provisions "do not place unfair restrictions on the jobs former government officials may choose, but they will prevent the misuse of influence acquired through public service."

Although the 1978 Ethics in Government Act was the first general statute to deal with government-wide conflicts of interest, there have been restrictions on post-employment activities for federal government employees since 1872. Language was included in an appropriations act for mail carriers that year making it unlawful for an officer, clerk, or employee in any executive department to act as an attorney or agent, within two years of cessation of employment, on any claim against the United States which was pending in the department during the officer's tenure in office.

Over the years, restrictions on post-government service were expanded. In 1962, President Kennedy proposed a statute on all post-agency employment that was enacted into law (18 U.S.C. §207) and President Lyndon Johnson in 1965 promulgated Executive Order 11222 outlining a comprehensive policy on conflicts of interest for the executive branch. Next came the Ethics in Government Act.

Title V of the Ethics in Government Act presently imposes three types of prohibitions on lobbying activities, with violators subject to criminal penalties under 18 U.S.C. §207:

> 1) a lifetime bar on former officials acting as a representative on matters in which the individual personally and substantially participated as a government employee;
>
> 2) a two-year bar on former employees representing anyone on matters that were within the former employee's official responsibilities during the last year of service;
>
> 3) a one-year bar on senior employees communicating with their former agency on behalf of anyone other than the United States with the intent to influence on any matter, whether or not the official participated in the matter.

There are clear indications that current law is inadequate because it does not recognize that a former high-level official's influence extends beyond the agency where he or she worked. The prohibition in current law against a high-level official lobbying his former agency is by no means commensurate with the scope of the inside knowledge he may possess or the influence he may wield.

Mr. Deaver, for example, went directly from being one of the President's closest advisors on matters ranging throughout the entire government to being a highly visible and highly paid lobbyist for corporations and foreign governments with direct and substantial interests not only in White House matters, but also in Executive Branch and congressional policies.

Magazine and newspaper articles as well as congressional hearings have provided a laundry list of other executive branch officials as well as Members of Congress and top-level congressional staff who have immediately cashed in on their government connections by engaging in lucrative lobbying of the government. As Independent Counsel Whitney North Seymour said in calling for the strengthening of existing law, "Any moderately competent lawyer could advise a former senior employee how to carry on a lucrative lobbying business involving otherwise highly questionable contacts with his former agency without any significant interference from the EIGA statute and regulations." Mr. Seymour raised concerns about "murky definitions" and "meaningless exemptions" in the Ethics in Government Act. In one example, he cited the ability of ex-officials to use surrogates to transmit messages to former co-workers. Mr. Seymour recognized the need to pass S. 237, the Integrity in Post-Employment Act, when he said "... A major start toward improving the Ethics in Government Act has already been made in a bill filed by Senators Thurmond, Metzenbaum and Specter."

This legislation was reported unanimously out of the Senate Judiciary Committee last July. Since then further improvements and adjustments have been made to the bill and a substitute version of S. 237 is expected to be offered by Senators Strom Thurmond (R-SC), Howard Metzenbaum (D-OH), and Carl Levin (D-MI) when the bill reaches the floor.

Under S. 237, Members of Congress and senior congressional staff would, for the first time, be covered by statutory restrictions on revolving door activities. This is vitally important. Too often in the past Congress has established requirements for executive branch officials while exempting itself from coverage.

The basic provisions of the S. 237 substitute follow:

Domestic Lobbying

o Top-level officials (Cabinet, Deputy and Undersecretaries, equivalent White House staff, Members of Congress) would be barred from lobbying any branch of the federal government for one year after leaving government.

o High-level executive branch officials (assistant secretaries, independent agency heads and equivalent White House staff) would be barred from lobbying the executive branch for one year.

o Senior executive branch officials and senior congressional staff (GS-16 or equivalent and above) would be barred from lobbying their former agency for one year.

- Exceptions are provided for former officials appearing as an attorney or representative in a judicial proceeding before a U.S. Court as long as the case does not involve the former official's agency or an agency matter in which the former official was involved.

Foreign Governments

- Top-level, high-level and senior-level executive and legislative branch employees would be barred from representing or working for a foreign entity (foreign government or political party or organization substantially controlled by either) for 18 months.

Enforcement

- Those who violate the law would be subject to civil as well as criminal penalties.

Compartmentalization

- The power of the Office of Government Ethics to classify divisions within an agency as separate for lobbying purposes would be revoked.

This legislation enhances the potential for enforcement by including the legal authority to impose a range of civil sanctions for violations in addition to criminal penalties.

The provision of the bill which would revoke OGE's authority to "compartmentalize" an agency for lobbying purposes is greatly needed. In 1983, OGE by regulation divided the Executive Office of the President into nine separate agencies, perverting the congressional intent of the revolving door provisions and substantially undermining the one-year ban against high-level officials contacting their former agencies. The General Accounting Office has sharply questioned the legal basis for this decision. This division is utterly without merit and severely undermines the Ethics in Government Act.

S. 237 is crucial integrity-in-government legislation that establishes clear, reasonable, enforceable cooling-off periods during which former high-level officials would be barred from lobbying the government. It would protect the government against Executive Branch officials, Members of Congress and senior staff who leave government and immediately try to benefit as lobbyists on the inside information and associations gained in public service.

S. 237 is ready for action on the Senate floor. Opponents want to prevent this legislation from coming up in the Senate for consideration and action. They must not prevail. If any Senator has changes to propose, they should be voted up or down as amendments to the bill. But the Senate must consider this legislation soon if there is to be time for it to be enacted into law during this Congress. With the growing concern around the country about ethics and integrity in government and with many public officials speaking out against the "sleaze factor," this legislation is a real test of whether Congress has the will to address the ethics problems in the Executive Branch and to apply the same standards it sets for others to itself.

Mr. Chairman, may I take this opportunity to express to you, on behalf of Common Cause, our appreciation for your leadership on this legislation. We particularly look forward to working with you when this bill comes before the full Senate for consideration.

C. REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

An essential component of the Ethics in Government Act of 1978 -- and one central to the establishment and maintenance of higher standards -- is Title IV, which created the Office of Government Ethics to oversee compliance with ethics rules throughout the executive branch. Section 402(b) of Title IV enumerates the following responsibilities of the Office of Government Ethics:

> -- developing and interpreting the rules and regulations pertaining to the identification, review and resolution of conflicts of interest and ethics in the executive branch;
>
> -- monitoring, reviewing and investigating compliance with the financial disclosure requirements;
>
> -- consulting with agency ethics officials and other responsible officials regarding the resolution of conflict of interest problems in individual cases;
>
> -- establishing a formal advisory opinion service;
>
> -- ordering corrective action on the part of agencies and employees;
>
> -- requiring reports from executive agencies as the Director deems necessary;
>
> -- evaluating the need for changes in conflict of interest laws promulgated by OGE as well as by other agencies;
>
> -- cooperating with the Attorney General in developing a system for reporting allegations of violations of conflict of interest standards; and
>
> -- providing information on and promoting an understanding of ethical standards in executive agencies.

As noted above, the statute explicitly authorizes the Director of OGE to order "corrective action" for agencies and employees. A corollary and necessary responsibility of OGE, therefore, is to inquire into, review, and analyze allegations of wrongdoing, particularly when they relate to high-level officials. In addition, as part of OGE's enforcement functions, the Senate Governmental Affairs Committee Report on the 1983 reauthorization of OGE emphasized the importance of OGE issuing public reports concerning its findings "in cases involving highly visible public officials." The report states: "This mechanism is especially important in cases involving highly visible officials which have already been made public.... Such public statements not only resolve the controversy surrounding such cases, but also increase public confidence in and awareness of the ethics program by indicating that an independent entity has reviewed the matter for ethical violations."

These three responsibilities -- to look into allegations of violations, to inform the public when standards have been violated, and to ensure enforcement of the standards where violations have been found -- constitute important functions of an effective Office of Government Ethics. Where allegations have been made against high-level officials, these functions are all the more essential.

The tools given by the statute to the Office of Government Ethics seemed at the time and still seem today to be adequate to the task of overseeing, administering and enforcing ethics standards. Indeed, the first five years of OGE's existence, while not entirely free from criticism, generally were encouraging. But during the subsequent four-year tenure of Director David Martin, OGE provided virtually no leadership on ethics. OGE failed in one of its most basic responsibilities -- to order enforcement of the law. It also failed to fulfill its critical function of clarifying important issues in the law. And it failed to make clear the reach and content of the law by rarely issuing public findings resolving the law's applicability to high-level officials about whom serious allegations were made. And, in fact, OGE undermined the law by misinterpreting it.

As columnist Haynes Johnson concluded at the time, "The so-called 'Office of Government Ethics' is a joke. Established as a bureaucratic means of overseeing and implementing ethical guidelines and rules ... it does so by silence ... An officially sanctioned air of indifference to all questions of ethical conduct and impropriety permeates Washington."

The Office of Government Ethics now has a new Director, former District of Columbia Judge Frank Nebeker. Judge Nebeker, only recently confirmed, has the opportunity to rebuild an agency badly wounded by the shabby record of David Martin. He has the opportunity to take a passive agency that has constrained itself from playing an active and necessary role in the government ethics arena and to enable it to fully carry out its statutory responsibilities.

But the enforcement of standards of conduct and ethics rules by the Office of Government Ethics should not depend simply on the good will of its Director. In our opinion, the Ethics in Government Act of 1978 gave OGE ample powers to oversee, administer and enforce our ethics laws. But four years of inaction and undermining have weakened the law. Our recommendations today boil down to a basic belief that we need a law that does not allow a future Director to hide behind supposed statutory ambiguities to justify inaction. The statutory mandate should be clear and precise.

I would like to suggest a number of steps which the Subcommittee may wish to consider as part of the reauthorization to set forth with more precision the responsibilities of the Office of Government Ethics, and to give the Office greater stature and additional resources. In doing so, I should also note that further discussion and exploration may well be necessary to determine how best to clarify and strengthen the mandate of the Office of Government Ethics.

1. Require OGE to address ethics violations involving political appointees

The Ethics in Government Act was built upon the premise that ethics enforcement in a government as large and complex as ours must in the first instance be decentralized, i.e., that the first line of enforcement must be within the agencies themselves.

Under current procedures, the Designated Agency Ethics Officials have first-line responsibility for counseling federal employees about conflicts of interest and for helping to bring them into compliance. In cases where the Designated Agency Ethics Official learns of a conflict of interest and is unable to bring about compliance, that case is referred to OGE. The Director of the Office of Government Ethics also has responsibility for reviewing the financial disclosure statements of political appointees. The Director may seek to resolve conflicts of interest or violations of ethical standards by working through the Designated Agency Ethics Officials or the agency head or by ordering corrective action. A civil servant who refuses to rectify the situation is subject to disciplinary action through the Merit Systems Protection Board.

While certainly more can and should be done to improve ethics enforcement and to give additional resources to ethics enforcement at the agency level, we believe that for the majority of civil service cases, this system is adequate. What has unfolded in recent years, however, is that numerous cases of allegations against political appointees have simply not been resolved while civil servants regularly face sanctions or the risk of sanctions for ethical misconduct. The result has been a double standard of ethics: one for the average civil servant and one for the high-level political appointee.

One case in point of the double standard of ethics application occurred during the confirmation process of Edwin Meese to be Attorney General.

During the Meese confirmation hearings, David Martin overturned his staff's recommendation and concluded that Mr. Meese had not violated portions of Executive Order 11222 that guard against the appearance of conflict of interest. Mr. Martin's explanation was that the rules prohibiting the appearance of conflict of interest were simply "aspirational" in nature. They weren't mandatory. They were just guidelines not to be strictly obeyed but merely "aspired to."

The rule which says government employees must not create the appearance of conflict of interest has long been viewed as mandatory and enforceable and has been used repeatedly to discipline civil servants. What Mr. Martin did was to establish a new standard for the benefit of Attorney General nominee Meese.

As a 1985 National Journal article noted, Mr. Martin's interpretation that "appearance only" was not a violation of the Executive Order

> was probably news to the Housing and Urban Development Department (HUD) appraiser who was fired in 1979 for managing two slums in Chicago owned by his wife, to the Navy data processing administrator at a Puget Sound (Wash.) shipyard who was demoted to a nonsupervisory position in 1983 for working on a computer package for pharmacies with a company that held a contract with the shipyard, or to the federal coal mine inspector who was suspended for 30 days in 1984 for writing a letter to a coal company alleging that it turned down his son's job applications because he has issued citations against the firm.

The double standard became quite apparent later when, after Mr. Meese was confirmed as Attorney General, Mr. Martin walked away from his newly-created interpretation of the appearance standard. He circulated a memorandum throughout the Executive Branch instructing ethics officers, in effect, to disregard the new standard he announced for Mr. Meese and to continue to enforce the Executive Order and the appearance standard as they had been prior to the Meese affair.

This example is just one illustration of a broad and serious problem. While OGE is given authority under the statute to act with regard to political appointees, it has rarely exercised that power. This cannot be allowed to continue. The reauthorization should specifically require OGE to address ethics violations involving political appointees.

2. Clarify the meaning of "corrective action" by expressly empowering the Office of Government Ethics to rule upon past violations

We also believe that Congress should clarify the statute regarding the scope of responsibility and the obligation of the Director to "order corrective action." The scope of corrective action should specifically include the ability of OGE to rule upon and impose sanctions for past violations as well as the ability of OGE to require action to bring officials into compliance with the law.

Reauthorization legislation should reiterate that the Director of OGE has broad power to order corrective action in instances where the standards of conduct are violated, including those cases involving conflicts of interest or the appearance of conflicts of interest. In addition, Congress should direct OGE's Director to make promulgation of any regulations necessary to assure due process a top priority and should re-emphasize OGE's responsibility to issue public findings as an enforcement mechanism, once a determination has been made as to whether a violation has occurred. Informing the public when high-level officials are found to have engaged in ethical violations is important to affirm that the rule of law applies to all individuals and to provide guidance to government officials generally, as well as to Designated Agency Ethics Officials, as to what constitutes a violation.

3. Consider changes in procedures necessary to provide authority and fairness in dealing with political appointees and past violations.

We have recommended above that Congress require OGE to address violations involving political appointees, which has been the weakest link in the present oversight process. In addition, we believe that Congress should consider changes in OGE procedures necessary to provide authority and fairness in dealing with political appointees and past violations.

Several states have taken the approach of establishing ethics commissions which have worked successfully.

In my own state of Massachusetts, the Massachusetts Commission, composed of five appointed members, is given powers typical of ethics commissions such as the power to inspect financial disclosure statements and to issue advisory opinions. Investigations are begun upon receipt of a sworn complaint or "upon receipt of evidence which is deemed sufficient by the commission." Any individual who is the subject of a preliminary investigation receives notice. If a preliminary inquiry indicates "reasonable cause for belief" that a violation has occurred, an adjudicatory proceeding may be initiated by a majority vote of the Commission.

The Commission, by summons, may require the attendance and testimony of witnesses and the production of documents. All testimony is given under oath and all parties have the right "to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, to submit evidence, and to be represented by counsel." Within 30 days of the end of such an adjudicatory proceeding, the Commission must meet and review the evidence. Within 30 days of making their decision, the Commission must render a written opinion. If the Commission finds that there has been a violation, it may issue an order requiring the violator to (1) cease and desist such a violation, (2) file any report required or (3) pay a civil penalty of not more than $2,000 for each violation. These decisions may be reviewed in the courts.

We recognize that such a system may not be the best to deal with the entire federal government. But we do believe that a clear process must be established so that allegations of wrongdoing against political appointees are resolved.

Another approach might be to give the Director of the Office of Government Ethics the power to convene a panel which, along with himself, would act as judges in a hearing when the actions of a political appointee are called into question and voluntary compliance is not achieved. Such a panel, for example, could be composed of Administrative Law Judges or chosen from retired federal judges.

Procedural rules established for this or any other process should ensure due process for federal officials and at the same time provide for the ability to resolve allegations against political appointees.

4. Strengthen the Office of Government Ethics by making it a separate agency from the Office of Personnel Management

With the passage of the Ethics in Government Act of 1978, the Office of Government Ethics was created as a subordinate office within the Office of Personnel Management (OPM). We believe that the Subcommittee should consider revising the current structure of the Office of Government Ethics by establishing it as an independent agency separate from OPM.

Ethics should be a high governmental priority and the office designed to oversee ethics programs and enforce ethical standards must be seen as having both stature and independence. The Director of OGE is given responsibility to take action against some of the most powerful people in government. To do so, he must be a high-ranking official and his office must be given real and symbolic authority.

The hard reality is that the position of OGE's Director is essentially that of a second echelon official within OPM who some might view as having neither the stature nor the institutional support necessary to enforce effectively ethics rules or to serve as a highly visible public watchdog and spokesperson.

As an independent entity, the Office of Government Ethics would have a higher public profile and its Director would be empowered with a stronger, more respected voice in the protection of ethical standards in the United States government.

Making OGE a separate agency would also free OGE from institutional and budgetary constraints which result from being part of OPM. The 1983 reauthorization legislation took a step in this direction by giving OGE greater powers of self-management. However, in testimony before Congress, OGE officials have acknowledged some frustration with the management and budgetary constraints with which they must deal as a subordinate entity within OPM.

5. Eliminate OGE's authority to "compartmentalize"

As I noted earlier, we strongly urge the Congress to repeal the authority of the Office of Government Ethics to designate components within an agency as "separate and distinct" when determining the scope of agency-wide revolving door prohibitions. Such a repeal is contained in S. 237, legislation to strengthen "revolving door" restrictions currently awaiting action by the Senate.

If for any reason S. 237 is not enacted into law this year, Congress should act to remove OGE's authority to compartmentalize for reasons discussed earlier and should rescind the 1983 regulation compartmentalizing the White House.

6. Improve cooperation with the Department of Justice

The Office of Government Ethics was created to provide central direction for the implementation of ethics policies in the executive branch. To perform this function, OGE must be kept appropriately informed of all criminal conflict of interest cases referred to the Justice Department. A June 1987 report by the General Accounting Office on "Ethics Enforcement: Process by

Which Conflict of Interest Allegations are Investigated and Resolved" indicates that this is not happening. The report states, "... Also, officials we spoke with in the offices of the IGs [Inspectors General] at both EPA and Interior, the Public Integrity Section, and the Office of U.S. Attorney for the District of Columbia told us that OGE is generally not notified when conflict of interest cases involving current employees are referred to the Department of Justice."

OGE needs the information for two reasons: first, because it is part of its overall responsibility for overseeing ethics compliance within the executive branch; and second, because it needs this information to be able to take other appropriate action when criminal prosecutions are not warranted. Therefore, we strongly urge this Subcommittee to include in the reauthorization a requirement that OGE be notified when a possible violation of criminal conflict of interest laws is referred to the Department of Justice, unless the attorneys in charge conclude that giving the information to OGE would endanger the criminal investigation, and that OGE be notified when a decision is made not to prosecute or a case is decided. We are not seeking to provide OGE with a role in criminal proceedings. But OGE should be given the opportunity to review closed cases in terms of non-criminal ethics requirements, rather than criminal violations. It is clear that this process is generally not followed and it raises concerns that serious ethical problems may be falling through the cracks because they do not meet the standards for criminal prosecution.

7. Require annual reports to Congress

For Congress to ensure that the Office of Government Ethics does not ignore its mandate, there must be a systematized method of collecting information to provide for objective review of how OGE is fulfilling its legislative responsibilities.

In 1985 Senator Levin submitted a written question to David Martin to determine whether OGE or the Designated Agency Ethics Officials kept records of violations of conflict of interest requirements or records of corrective actions taken in response to violations. Mr. Martin did not respond to Senator Levin's question about the recording by OGE or agency ethics officials of violations. He did admit that 1981 was the last calendar year for which OGE compiled specific data regarding corrective action directed by OGE. In addition, OGE staff in 1986 said that, in recent years, OGE had not ordered any corrective action.

We believe that the reauthorization bill should rectify this situation by requiring that OGE submit annual reports to Congress. These reports would give the information necessary for analyzing OGE's performance, providing important comparative data. In our view, the annual reports would enhance the ability of lawmakers to conduct effective oversight, to hold the Director accountable and to make needed revisions and improvements.

The kinds of information that could be included in such a report are:

-- the actions taken by OGE pursuant to each of its fifteen responsibilities enumerated in Section 402;

-- information regarding the rules and regulations promulgated by the Office that year;

-- the number and type of corrective actions ordered;

-- the number of inquiries or investigations into allegations of ethical violations and how they were resolved; and,

-- information on the agencies audited, ensuring that those audits are also referred to the congressional authorizing committees with responsibility for that agency or department.

8. Grant the authority to conduct random audits

Common Cause supports strengthening enforcement through the addition of random audits by OGE of financial disclosure statements, similar to those used by the Internal Revenue Service for tax returns. The prospect of a random audit would be a strong additional incentive to disclose promptly, accurately and completely, and would give OGE an additional tool with which to oversee the ethics program and to check compliance. We believe that the number of random audits required could be quite small and would still provide an effective incentive for full compliance with the financial disclosure requirements. We also support a system of random audits for congressional and judicial disclosures. Of course, unless violations requiring further action are disclosed, the information gained by the auditors should be kept secret.

9. Clarify congressional intent

In addition to the statutory revisions we have proposed, Common Cause would also encourage the Subcommittee to go on record with clear and unequivocal direction for the OGE to undertake the following:

-- improve its review of financial disclosure statements;

-- improve its training component;

-- clarify the standards for recusal and for obtaining waivers;

-- provide guidance through the issuance of regulations on key ethics questions;

-- develop a model for monitoring post-employment revolving door activity (for example, develop routine procedures which would deter potential violations as well as uncover actual violations); and

-- improve its reviews of financial disclosure statements of high-level officials.

10. Provide OGE with the necessary resources

Mr. Chairman, I began this testimony by talking about the the crisis of ethics permeating Washington and tainting government service.

Clearly, dramatic action is needed to restore the public's trust in government. One way to show congressional commitment to improving the nation's ethical standards in government is to provide OGE with the additional resources needed to fulfill its responsibilities. In FY 1988, OGE's operating budget is $1.580 million with 30 full-time equivalent (FTE) positions. The proposed level of funding for FY 1989 is $188,000 higher, with an increase of five positions.

Even with a Director committed to upholding the law, it is extremely difficult for OGE to fully meet its mandated responsibilities with this level of manpower and funding. We strongly urge this Subcommittee to authorize an increase in the authorized level of funding for OGE, lifting the $2 million ceiling currently in effect. We are also hopeful that during consideration of appropriations, the Senate will appropriate the full amount of authorized funds. According to testimony before Congress, handicapping OGE's efforts the most is the personnel ceiling currently imposed by OPM. We would urge Congress to direct OPM to increase the ceiling, at a minimum providing OGE with the increases it has requested (five additional FTE in FY 1989, 16 additional FTE in 1990).

The upcoming presidential transition presents special problems. Hundreds of presidential appointees will be coming into government. OGE will face the task of reviewing their financial disclosure statements, ensuring that they are in compliance with applicable rules and regulations and certifying to Congress that appointees have taken the needed steps to avoid conflicts of interest. OGE should also be provided with the flexibility to increase personnel during the presidential transition, perhaps by having personnel from GAO or the offices of Inspectors General temporarily detailed to OGE.

We recognize that we are in a time of serious budget deficits and that resources are limited. The increases we believe are necessary are small and they are essential. The savings both to the Treasury and the public from stricter compliance with ethical standards will many times exceed the small additional appropriations.

The next Administration -- be it Republican or Democrat -- must create a new ethical climate. A strong and active OGE can only benefit this nation. Every effort should be made to ensure that all OGE Directors understand their obligation to faithfully enforce the law. We urge this Committee and other appropriate committees, through effective oversight, to help ensure that OGE lives up to its statutory responsibility.

D. MAINTAINING THE INDEPENDENT COUNSEL

I am reluctant to close a discussion of government ethics and the executive branch without mentioning the crucial role of the Independent Counsel which is essential to preserving public confidence in the ethical behavior of executive branch officials.

We at Common Cause were pleased when the reauthorization legislation was passed by Congress and signed into law by President Reagan last year. We appreciate the important role this Committee played in the reauthorization.

IV. CHANGES NEEDED IN CONGRESSIONAL RULES

Ethical problems are not limited to the Executive Branch. Congress has come under increasing criticism for exempting itself from almost every regulation affecting civil rights and administrative action, including regulation of ethical behavior by its Members. We believe it is time to end this double standard. Congress should put its own house in order.

In the last 200 years, recurrent cycles of scandal and reform have produced notable improvements in the ethics rules established for our federal legislators:

-- between 1830 and 1850, several scandals surfaced regarding legislators arguing cases before the Supreme Court in which they had a substantial personal interest. Changes were made in federal claims settlement procedures;

-- in the early 1900s, federal employee involvement in congressional elections created concerns about the politicization of the federal workforce which culminated in the enactment of the Hatch Act, limiting federal employees' participation in partisan politics;

-- in the 1950s, Senator Paul Douglas chaired a committee proposing a commission to study governmental ethics. In 1958, a Congressional Code of Ethics was enacted for one Congress but it expired at the end of that year. No provisions for enforcement were made for another 10 years.

-- in 1968, after failing to deal satisfactorily with the Bobby Baker and Adam Clayton Powell cases, first the Senate and then the House of Representatives wrote into their rules rudimentary codes of ethical conduct.

-- in 1977, in the aftermath of Watergate, both houses adopted codes of conduct which covered financial disclosure, limitations on outside earned income, gifts, mass mailings, office accounting procedures and the use of campaign funds.

Public disclosure of personal financial interests and campaign contributions has resulted in a more open and informed system unmarked by many of the past schemes and under-the-table dealings. But the job is far from finished.

The single most important challenge now facing Congress is to enact comprehensive reform of the discredited and corrupt system for financing congressional elections. As Senator David Boren (D-OK) recently observed, "The high offices of this land are being put on the auction block for sale to the highest bidder." The dangerous and growing role played by political action committees in congressional campaigns must be curbed. There must be limits on the massive sums being expended to run for office. Legislation to achieve these goals is a top priority for Common Cause.

There are a series of additional reforms that Congress should undertake to put its own house in order.

A. STRENGTHENING CONGRESSIONAL ETHICS RULES

1. Ban honoraria

In 1985, the top 10 defense contractors gave Members of Congress total honoraria fees of $236,163. This represents a ninefold increase in the amount these same contractors gave in 1981. More than three-quarters, or $182,100, of the defense contractors' honoraria money went to members of the Armed Services Committees or the Defense Appropriations Subcommittees. It came on top of the almost $3 million in campaign contributions the political action committees of these same 10 defense contractors gave to all candidates during the 1986 congressional elections.

A Common Cause study of the 79 incumbent Senators who filed their financial disclosure forms in May 1987 reported total 1986 honoraria receipts of $2,407,368 -- 22 percent more than their total honoraria receipts in 1985. On average, these Senators received $30,473, gave $8,848 to charity and kept $21,624 for personal use. The Senate salary in 1985 and 1986 was $75,100. It is now $89,500 for both Senators and House Members. According to Senate rules, each Senator is permitted to keep honoraria payments up to 40 percent of the Senate salary. Any excess of the 40 percent limit must be donated to charity. House Members are limited to 30 percent in outside income. Thus House Members can earn a maximum of $116,350 annually from salary and speeches and Senators, $125,300.

The significant increases in honoraria accepted by Senators over the last few years underscore the need to enact tough new restrictions on honoraria fees for Members of Congress. Common Cause believes that using honoraria to supplement congressional pay is dangerous. It is a way for special interest money to be funnelled directly into the pockets of public officials. Like special interest money in the form of PAC campaign contributions, honoraria fees are destroying the institutional integrity of Congress.

Honoraria fees are in effect prohibited for executive branch and judicial officials. They should also be banned for Members of Congress and their staff.

Common Cause has consistently supported periodic increases in pay for all branches of government. In 1976, the Commission on Executive, Legislative and Judicial Salaries recommended a significant pay increase for Members of Congress linked with new restrictions on outside earned income. The new quadrennial pay commission which forms in October of this year provides an excellent opportunity to review existing salary levels and to recommend appropriate increases. It also provides a critical opportunity not only to deal with the compensation issue but also with the need to ban honoraria fees.

2. Tighten the rules on travel and reimbursements

A recent Common Cause study, based on hundreds of congressional financial disclosure statements, reveals a growing pattern of travel abuse by dozens of Members of Congress. Some of these abuses are potential violations of congressional ethics rules governing travel reimbursements and gifts from special interests. The rules are designed to prevent business trips from turning into vacations at special interest expense. But that is exactly what is happening.

Under the current ethics rules governing Congress, Members are barred from accepting gifts worth more than $100 from groups, individuals or corporations with a direct interest in federal laws. The Senate defines that interest by the existence of a PAC or registered lobbyist. The House definition bars gifts from interests with registered lobbyists or others with a direct interest in legislation before Congress. The rules are spelled out in ethics codes enacted in the wake of Koreagate, which highlighted the extent to which special interests attempt to buy influence.

The rules are good as far as they go, but in recent years, by using creative interpretations of the rules, many Members and special interests have found a way to cloak all-expenses-paid family vacations -- some valued at more than $5,000 -- in the guise of legitimate reimbursements for speaking and fact-finding trips. A comparison of the 1980 and 1985 disclosure forms shows that congressional travel at interest group expense has grown exponentially. The average number of reimbursements Senators received increased almost 20 percent and the number of nights they spent away at the expense of trade associations, businesses, lobbyists and other special interest groups rose by more than 50 percent. The increase in the House was even more dramatic: the average number of reimbursements to Members more than doubled and the average number of nights away more than tripled during the same period.

The House and Senate Ethics Committees have approved of this practice by issuing interpretations and advisory opinions regarding travel reimbursements that undermine the original ethics code. For example, an advisory opinion by the House Ethics Committee interpreted the ethics rules barring all gifts over $100 to allow all necessary expenses associated with participation by a Member at a conference to be reimbursed by the sponsor of the conference, even when that sponsor may have a direct interest in legislation pending before one of the Member's committees. The definition of what constitutes "participation" in an event is broad enough to allow a Member to be reimbursed for a trip to Hawaii as long as he or she participates in a discussion group at the conference. Reimbursement for the expenses of spouses who come along on such trips is also allowed. Reimbursement for the expenses of children accompanying Members on these tours is prohibited in the House, but allowed in the

Senate if the child can be legitimately described as performing the functions of a congressional aide.

Common Cause urges the House and Senate to amend their Codes of Conduct to establish clear restrictions against using reimbursed travel as paid vacations. For example, the only reimbursable expenses should be travel to and from the event, overnight expenses for specific time periods for reaching the event (e.g., one day to get there and another to return), and accommodations during the event. Also, reimbursed travel by family members should be eliminated.

3. Tighten the restrictions on financial holdings

The current Congressional rules give Members little guidance with respect to the potential problems asssociated with stock investments. The current rules also leave members of the public and officers and employees in the executive branch under the impression that Members of Congress are unwilling to govern themselves by ethical rules applicable to those in the executive branch and to other fiduciaries. The present rules require financial disclosure of outside holdings and income by broad ranges. The present rules also say that Members "are prohibited from improperly using their official positions for personal gain." But the present rules give no further guidance except to say that Members are "not ... required to divest upon entering their positions, nor are Members mandatorily disqualified from voting on matters affecting personal financial interest."

Failure to address the issue more precisely creates abuse and distrust. It is all too easy to envisage situations involving Members of Congress with financial interest that would plainly require them to abstain from acting in an official capacity upon a matter so directly and peculiarly involving their individual financial interest if they were in the executive branch or held positions of private trust. For example, a Member who bought or sold stocks in a particular business or even an industry undergoing Congressional scrutiny by a Committee of which he was a member would face a conflict of interest sufficient to deter anyone of normal sensitivities. Similarly, serious questions would be raised if a member of the Armed Services Committee held large amounts of stock in a company that made a particular type of aircraft or particular weapon when that Committee was deciding whether or not to appropriate money for the aircraft or weapon. Again, it would be seen plainly wrong for a Member of Congress to preside as Chairman over the hearings on a controversial land development bill and then to case a Committee vote while owning the special kinds of land affected by the proposed legislation.

Silence in the face of these potentialities is bad for Congress and bad for the country. Failure to deal with conflicts of interest on Capitol Hill suggest that Congress either is discriminating against executive officers and employees or else does not take very seriously even the ethical standards it prescribes for others.

We urge the Congress to address these problems. Various solutions are available -- requiring recusal in special situations, or requiring divestiture of certain kinds of holdings tailored to committee assignments, or establishing blind trusts, etc. For the Senate and House of Representatives to begin facing up to these very real problems with a view toward establishing clearer, firmer rules would not only remove the sense of grievance and answer the charge of hypocrisy but would also do much to restore public confidence in the Congress of the United States.

4. Remove the "Grandfather Clause"

In 1979, Congress amended federal law to prohibit candidates from converting surplus campaign funds for personal use. Under a "grandfather clause" included in that amendment, however, any Member of Congress who was in office on January 8, 1980, is permitted to keep his or her surplus campaign contributions for personal use after leaving Congress -- although the Senate has adopted rules that prohibit all Senators from converting funds for their personal use. This means that campaign contributions in excess of campaign expenditures can go directly into the Members' personal pocket. Surplus funds are also valuable to Members for potential use in future elections and to discourage potential challengers from running for office.

At the end of the 1986 election campaign, House candidates had $49 million in surplus funds, more than triple the

$15 million held by House candidates following the 1980 election. Almost all of these surplus funds were held by incumbents. Fifty-four House candidates, all incumbent winners, reported year-end 1986 surplus funds of $250,000 or more. Of the 54 Representatives, all but seven are covered by the "grandfather clause."

At the end of the 1986 election campaign, 1986 Senate candidates had $10.3 million in cash-on-hand, a 41 percent increase over the $7.3 million in cash-on-hand held by Senate candidates following the 1984 election. Fourteen Senate candidates, all but one an incumbent winner, reported year-end 1986 cash-on-hand of $250,000 or more. Half are covered by the "grandfather clause."

The substantial increase in surplus funds being held by Members of Congress reflects the fact that incumbent Members are raising substantial amounts which have not been necessary for their campaigns and which are being stockpiled. And PACs are playing a key role in supplying those funds, particularly in the case of safe-seat incumbents.

Congress, which already has recognized the problems inherent in allowing retiring Members to convert contributions into personal funds by banning this activity for many Members, should complete the task started in 1979 and remove the "grandfather clause," thereby prohibiting any and all Members from pocketing leftover campaign funds when they leave office.

5. Tighten the rules regarding use of campaign funds for non-campaign purposes

House ethics rules clearly forbid the conversion of campaign funds to personal use. Last year, however, House Ethics Committee Chairman Julian Dixon (D-CA) spoke on the floor of the House of the "recurring problem" of the misuse of campaign funds and reminded Members that House rules require that campaign funds be expended only for "bona fide campaign purposes." The misuse of campaign funds is widespread and it is time that Congress address the problem.

Chairman Dixon's statement was made after the House Ethics Committee found that Representative Richard Stallings (D-ID) had improperly borrowed almost $5,000 from his campaign and had lent another $1,000 from the fund to an aide. In March of this year, the House Ethics Committee found that Representative Charlie Rose (D-NC), in violation of the House rule, also improperly borrowed money from his campaign funds. The Committee found this behavior "deserving of reproach."

Recent articles in several newspapers document the use of campaign funds for expenses that seem only distantly related -- if at all -- to legitimate campaign purposes. Examples include the purchase of a microwave oven for a Member's congressional office, the purchase of an original cartoon featuring the Member, and a common practice of paying club dues with campaign funds. Campaign funds have also been used to pay the travel expenses of a Member's spouse when accompanying him or her abroad on the grounds that the spouse's presence is necessary at formal receptions and dinners. Money donated to congressional campaigns also finds its way to a variety of charities and to the campaign funds of other candidates -- including presidential candidates.

Finally, according to a recent Legal Times article, at least six House Members who were under indictment or investigation dipped into their campaign funds to pay their legal fees. Both the House Ethics Committee and the Federal Election Commission have approved of this practice as long as the matter is one arising from a Member's election to or holding of federal office.

Campaign funds are donated by individuals to further a candidate's bid for office; they are now being used as a general slush fund to cover incidentals and extravagances. Steps must be taken to tighten up the rules and prevent the abuses which are occurring in the way campaign funds are being used by Members of Congress.

B. STRENGTHENING ENFORCEMENT OF CONGRESSIONAL ETHICS

The Ethics Committees of the House and Senate have three responsibilities: to provide leadership on ethical issues, to offer correct interpretations of the ethics rules, and to vigorously enforce those interpretations and rules. The Committees' work is essential to public confidence in government. As the Select Committee on Ethics in the 95th Congress emphasized, "[i]t is the duty of those entrusted with the conduct of the public's business to use their office only for the benefit of the governed, and not to enhance their private financial interests at the expense of the public interest. This fiduciary concept of public office provides the basic standard of conduct for government officials."

The House Ethics Committee has had a recent history of failing to enforce House rules. While the Senate Ethics Committee has not had the number of ethics cases to act on as has the House, we believe that both the House and the Senate Committees must vigorously enforce ethics rules and play a more active leadership role on ethics issues.

A 1985 report entitled "The Ethics of Legislation Life" published by the Hastings Center states, "Throughout most of American history legislatures have been reluctant to discipline members for ethical offenses, preferring instead to see the voters weed out blatant corruption at the polls." But history demonstrates that it is possible for Congress to police itself -- during such times as the Abscam scandal and Koreagate, the Ethics Committees have conducted serious investigations of Members. Such actions occur only when there is strong leadership from the congressional leadership and the members of the Ethics Committees; without it, the enforcement of ethical standards lapses.

The House Ethics Committee, in particular, has had a history over the past few years of virtually abdicating its role to vigorously and effectively enforce the ethics rules and standards that apply to Members. Following public criticism, there is evidence that the House Ethics Committee in recent months has begun to step up its pace in investigating allegations of wrongdoing. But the jury is still out. With the recent recommendation that the House expel Representative Mario Biaggi (D-NY), who was convicted of taking illegal gratuities, the Committee has taken a clear stand. On the other hand, the Committee also recently found that Representative Rose violated the House rules by improperly borrowing money from his campaign funds, yet the Committee once again failed to recommend any sanctions -- a pattern of action by the Committee that threatens to destroy ethics enforcement. The Committee concluded that his behavior was "deserving of reproach" but stated that he had tried to rectify the problem.

This type of ineffective enforcement -- which finds that remedial steps taken after the fact by ethics violators eliminates any need for sanctions -- undermines the Committee's credibility and the integrity of Congress as a whole. Common Cause believes that it is absolutely essential for the congressional Ethics Committees to make clear to the public and to Members that they are prepared to enforce the ethics standards and that they will recommend appropriate sanctions against Members who are found to have violated the rules.

In the Senate, there have also been problems. A loophole in current Senate ethics rules allows partisan election committees to funnel millions of dollars into official office accounts for defraying Senators' "official expenses." This funding has ended up footing the bill from everything from telephone service to personal and political benefits like fancy meals and prepared television spots.

Senators who exceed the allowance the government has given them to pay for their office expenses, or who claim they don't want to spend taxpayer money on "official expenses," or who buy things Senate rules say can't be paid for with government funds, literally send their bills to the party's election committee.

An examination of this new "slush fund" shows that they are not only being used for questionable personal benefits, but also as a means of circumventing federal campaign limits.

There is also evidence that Senators have used these slush funds for personal use without paying taxes on them as required by the Internal Revenue Service. In 1986, Common Cause called on the Ethics Committee to investigate this matter but the Committee refused to do so. The House abolished the use of slush funds in 1977. So did the Senate. However, this loophole continues to undermine the rules and should be closed.

At a time when questions of government integrity are in the forefront of public concern, it is critically important for the Ethics Committees to make it clear that Members of Congress who violate congressional rules will be held accountable. We strongly urge all Senators of this Committee to address this matter and to take appropriate steps to help ensure that Ethics Committees fulfill their institutional responsibilities.

V. CONCLUSION

I have focused today on recommendations for changes in the Ethics in Government Act, for changes in Congressional ethics procedures and for changes in the spirit of leadership from the very highest levels of government. I should also note that ethical standards in government are also affected by action in a number of other areas.

Clearly, reform of a fundamentally corrupt campaign finance system remains the most crucial challenge facing Congress. Congress must enact comprehensive campaign finance reform that will remove the taint of curried favor and purchased positions.

We are also concerned about efforts to strip the Hatch Act of its basic prohibition on any partisan political activity by federal workers. Common Cause has already testified before Congress on this issue and we are convinced that the view we share with the Senior Executive Association, the Federal Executive Institute, and thousands of federal employees should prevail.

Common Cause continues to be concerned with efforts to weaken the Foreign Corrupt Practices Act, as well as with proposals to strengthen protection for "whistleblowers."

It is a battle on many fronts, I admit, but an essential battle that must be won for the survival of our democratic system.

May I close, Mr. Chairman and members of the Subcommittee, where I began. Your challenging task is to find ways of giving life, substance and concrete meaning to the old precept that "a public office is a public trust."

What is required is rebirth of the sense that public office and public employment are sacred trusts to be enjoyed, beyond the stated compensation, for the tremendous challenge and personal satisfaction of serving the public good and not for "what's in it, now or hereafter, for me." Building the spirit of unselfish public service requires both leadership and example.

The spirit is missing from Washington today. The Office of Government Ethics has been allowed to become a joke, and the President himself is silent even in the face of his appointees' blatant misconduct.

I sincerely hope that this Subcommittee can help provide the needed leadership with strong backing from the public and from the new President.

STATEMENT OF LLOYD N. CUTLER

My name is Lloyd Cutler. I served as Counsel to the President in the last sixteen months of President Carter's Administration. Along with my successor in that post, Mr. Fred Fielding, Counsel to President Reagan, I served as Co-Chairman of a Committee formed to study the Ethics in Government Act organized by the Kennedy School of Harvard University. This study was part of a broader Public/Private Careers Project that also covered compensation, recruitment and other aspects of the problems of improving the quality and morale of our public servants. I believe a copy of our report has been submitted to the Committee. While I support all of the Committee's conclusions, my testimony today will concentrate on my own personal views.

In my opinion the Act performs a necessary function -- maintaining public confidence in the integrity of the Federal Government -- and it should be continued without major change. My principal suggestions for improvement are as follows:

1) The financial reporting requirements of the OGE forms regulations are excessive, and may have a deterrent effect on recruiting and retaining private citizens for occasional public service in the course of a career spent primarily in private life. In my view, all the essential financial information needed to disclose and deter conflicts of interest could be developed by a far less intrusive questionnaire. To whatever extent the excessive reporting is mandated by statute, the statutory requirements should be modified.

2) When an incoming or incumbent public official is required to divest a particular shareholding or other financial interest to avoid an appearance of conflict, he may be subjected to a substantial capital gains income tax that he would not have to pay if he were not a public official. To avoid the deterrent effect of this tax liability, we ought to treat such divestitures as involuntary or like the sale of a residence, so that no current tax is paid and the taxpayer's cost basis is rolled over to the new assets he acquires.

3) The existing substantive law relating to conflicts while in government service is suited to its purposes and does not require change. However, it is scattered over many statutes and regulations which sometimes conflict with one another and would benefit from a new codification. It is also clear that many government employees do not fully understand the scope and gravity of these provisions, and that additional legal counseling should be encouraged and provided.

4) The existing substantive law relating to post-employment conflicts is sufficiently draconian already. More sweeping post-employment rules would be a substantial deterrent to attracting and retaining the best young and mid-career professionals.

The only statutory changes I would recommend in the post-employment rules are to expand the current restrictions to former Members of Congress and former Congressional staff, and to provide a civil remedy with civil standards of proof to supplement the present criminal sanctions, which are far more difficult to enforce. I would propose a civil remedy to recover any fees or other compensation earned in violation of the post-employment rules. A government right to rescind any government contract or license obtained by the employer of the violater may already exist under the Mississippi Valley decision of the Supreme Court, but an express statutory right to rescind might also be considered.

In addition to these statutory changes, I would recommend additional legal counseling of all those who are leaving government service. Receipt of the last payroll check might well be conditioned on participation in a full written and oral briefing on the post-employment restrictions of the law.

I would like to conclude by putting in a word of mitigation in defense of the custom presently maligned as the "revolving door." In an earlier time, those who passed through the revolving door were known and praised as citizen-statesmen in the tradition of the Roman General Cincinnatus -- a private citizen who occasionally entered public service in response to his government's call. That is a noble and invigorating feature of American Government, a feature that is unique among the democracies of the world. In our zeal to punish and deter the few who abuse the revolving door, we would be wrong to nail it completely shut.

Mr. Chairman, I would like to submit for the record an op-ed piece I wrote at the request of the Scripps-Howard newspapers, setting forth my views on this subject and on the provisions of what I call the "never again Mike Deaver" bill that in my view would deprive succeeding generations of the citizen-statesmen who have served us so well in the past.

SCRIPPS-HOWARD PIECE

Let's Not Shut the Revolving Door

The "Never Again Mike Deaver" bill is close to passage in the Senate. With sponsors as diverse as Strom Thurmond and Howard Metzenbaum, how can it fail? Its purpose is to tighten the longstanding conflict of interest laws that make it a crime for present or former government officials to abuse their public trust for private gain.

There are some desirable improvements in the bill. Since criminal convictions for technical white collar crimes are so difficult to obtain, it adds a civil enforcement alternative. Anyone who violates the law can be required to pay over to the government the fees earned by the violation, plus a penalty of 100%. And for the first time, former Senators and Congressmen and former congressional staffers would be subjected to the same conflict of interest rules they have legislated for former executive branch officials.

But because of the Deaver case, the bill's restrictions on post-employment activities involve so much overkill that they may deter many of our best qualified citizens from taking their turn as occasional public servants. Present law bars any former official forever from advising or acting on any matter in which he participated as a government official, and from appearing for one year before his former agency on any other matter. But under the new bill, a lawyer who specializes in food and drug and securities law and is appointed as a Securities and Exchange Commissioner could not, on his return to private life, resume his food and drug practice before the Food and Drug Administration. For one year, he would be barred from appearing not only before the SEC, but before any other department or agency of the government. Moreover, the new bill would bar a former Cabinet-level official from advising or representing any foreign government or entity under its control as to any matter, whether or not it concerns the United States, for eighteen months after his return to private life. A former Attorney General or White House counsel could not advise or represent West Germany in a case against France before the International Court of Justice, even though the case has nothing whatsoever to do with the United States or the former official's responsibilities while a public servant.

The avoidance of conflicts of interest is an important political value in our system of government, but it is one among many important and often competing values. A second and equally important value is citizen participation in government, not only as voters or lifetime civil servants but also as occasional public servants during a primarily private career. Cincinnatus was a glorious and ancient example, emulated in this century by such admired citizen-statesmen as Elihu Root, Charles Evans Hughes, Henry Stimson, Dean Acheson, Cyrus Vance and George Shultz.

All of us want our government to attract to its service the most intelligent and public-spirited citizens we produce. None of us wants our government to consist solely of lifetime officials. Since we want as many citizens as possible to participate at least occasionally in public service, we must not make such service a positive detriment to the citizen's pursuit of a rewarding public-private career.

For all these reasons, the opportunity to move from private life to public service and back again is a refreshing and invigorating feature of our political system. In my view, we would pay a heavy political cost if we adopt such rigid post-employment rules that future generations will not produce their own counterparts of the citizen-statesmen listed above. Although they moved frequently between private and public life, none of them came anywhere near violating a conflict of interest rule. All of them followed the simple maxim: "How would you like to read about it on the front page of the Washington Post?". It is that principle, rather than rigid criminal laws, that persuades our best citizen-statesmen to steer well outside the danger zone.

The nation has been enriched by public servants of this caliber. The nation will be impoverished if we do not see their like again.

STATEMENT OF JOHN C. KEENEY

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice concerning reauthorization of the Office of Government Ethics (OGE). I will address the four specific areas of concern identified in the Subcommittee's letter of March 25, 1988 to the Attorney General. Before I do so, however, I believe it would be useful to describe how the work of OGE and of the Criminal Division complement each other. As you know, the Criminal Division and the United States Attorneys offices prosecute violations of the conflict of interest laws.

The OGE attempts to facilitate understanding of these laws among executive branch officials and thereby minimize the risk of inadvertent violations. Ethics counsels throughout the executive branch provide counseling and may pursue appropriate administrative sanctions when warranted. The OGE tries to ensure that executive branch officials are aware of the requirements of the conflicts of interest laws by developing regulations on post-employment activity and policies concerning all these statutes, issuing advisory opinions, and reviewing the financial disclosure reports of Presidential nominees. OGE also monitors the adequacy and effectiveness of federal agency ethics programs, and sponsors training conferences for agency ethics personnel.

The Criminal Division's Public Integrity Section helps the OGE to perform its advisory function effectively by consulting with the OGE on various matters such as questions involving statutory construction and the processing of cases in the criminal justice system. The Public Integrity Section expects to participate in a program presented to agency ethics officials by the OGE in the near future.

The overall objective, of course, is to assure effective coordination between the advisory and prosecutive components of the executive branch. We receive matters that have been referred to us by various government agencies, the Inspectors General, the Federal Bureau of Investigation, private individuals, and others, and we then make a determination as to whether an investigation or prosecution is warranted. Three of the four questions asked in your March 25 letter relate to our prosecutive and investigative function, and I will now address them.

Effectiveness of Current Law

First, the Subcommittee has requested the Department's views concerning the effectiveness of current conflicts of interest laws, specifically those in 18 U.S.C. 202-209, and our views concerning the need for amending those laws. Sections 207, 208, and 209 apply only to employees of the executive branch. Our chief concern is that this coverage is too narrow. The Department believes these provisions should apply to the legislative and judicial branches as well as to the executive branch and independent agencies. They should apply not only to former Members of Congress and former Judges, but to former high level employees of the Congress and the Judiciary.

Moreover, we have advocated other changes to 18 U.S.C. 207. We think that grading knowing violations as misdemeanors and willful violations as felonies would provide more flexibility for prosecutors.

System for Reporting Violations

Second, the Subcommittee has asked that we address the system for reporting allegations of violations of conflicts of interest laws. Before discussing the existing statutory and administrative requirements which relate to referrals of such allegations to the Department of Justice, I would like to emphasize that we do not believe that the current system requires any change. There is no indication that government investigative agencies or others are confused concerning the requirement that such allegations be reported to the Department of Justice or are otherwise encumbered. Currently, allegations of conflicts of interest violations may be referred directly to a United States Attorney's Office or to the Public Integrity Section. The Department has experienced no significant problems in coordinating referrals and insuring that they are appropriately investigated. The existing reporting system is sufficient to accomplish effective criminal law enforcement.

The Subcommittee has also asked that we consider whether the OGE's role in monitoring referrals should be expanded. Although we do not believe that modification of the OGE's monitoring role would have a discernible effect on our ability to enforce the statutes, we defer to the OGE as to the effects on its programs.

Generally, Title 28, United States Code, Section 535, imposes upon every department and agency of the executive branch the duty to report expeditiously to the Attorney General" any information, allegation, or complaint" relating to violations of Title 18, United States Code, involving government officers and employees. Guidelines relating to this section have been issued by former Attorneys General to the heads of all departments in the executive branch. The guidelines are contained in two widely distributed memoranda, one by Attorney General Edward H. Levi dated May 4, 1976, and the second by Attorney General Benjamin R. Civiletti dated June 4, 1980, expressly intended to supplement the Levi memorandum.

The memorandum of former Attorney General Levi specifically notes, at footnote 1, page 2, that for the purpose of the reporting requirements set forth in the memorandum, the phrase "government officers and employees" includes a former officer or employee when the suspected offense was committed during his federal employment and when the suspected offense, although committed thereafter, is connected with his prior activity in the federal service. The memorandum cites Section 207 as an example of such a circumstance. The memorandum directs that information referred pursuant to Section 535 be reported to the local office of the appropriate investigative agency, the Office of the United States Attorney for the district in which the violation occurred, and directly to the appropriate Division of the Department of Justice.

In addition, the Inspector General Act of 1978 requires that each Inspector General report expeditiously to the Attorney General when the Inspector General has reason to believe that there has been a violation of federal criminal law. Further, 5 C.F.R. § 737.1(c)(6), requires that heads of executive branch departments and agencies report substantiated allegations of violations of Section 207 to the OGE as well as to the Department of Justice. Finally, the Public Integrity Section and the OGE have an informal but close relationship regarding the prevention of conflicts of interest offenses.

In sum, conflicts of interest allegations, like allegations relating to possible violations of other criminal laws, may initially come to the attention of the Inspectors General, the general counsels of the various agencies, or designated agency ethics officials, criminal investigative agencies like the Federal Bureau of Investigation, the OGE, private individuals and organizations, or the press. In spite of the large number of ways in which such allegations may be received, we believe that there are no exceptional problems relating to referral of conflicts of interests allegations for criminal investigation and prosecutive evaluation.

Number of Prosecutions

Third, the Subcommittee's letter notes that a small percentage of conflicts of interest cases that Inspectors General refer to the Department of Justice are prosecuted. The Subcommittee requests that we address the level of prosecutions.

As discussed in our recently published manual entitled Prosecution of Public Corruption Cases, a conflict of interest investigation is conducted much like any other criminal investigation. Allegations are investigated mainly by the Inspectors General or the FBI, or both. The main objective is to collect information sufficient to resolve the allegation; that is, to demonstrate that an offense has been committed, that no offense has been committed, or that there is insufficient evidence to prove or disprove the allegation and no reasonable likelihood that further investigation would be worthwhile. At bottom, conflicts of interest cases are declined when they are found to lack prosecutive merit.

In this regard, the criteria employed in reaching a prosecutive determination are not unique to conflicts of interest cases. The Department's prosecutive polices are set forth in the "Principles of Federal Prosecution," published in the United States Attorney's Manual (U.S.A.M. 9-27.000 et seq.). These guidelines for the federal prosecutor describe various factors that should be considered when making a prosecutive decision.

In addition, the Manual sets out an overview of the conflicts of interest laws beginning at 9 U.S.A.M. 85.200. A section related specifically to prosecutive policy (9 U.S.A.M. 85.203) provides that allegations of violations of the federal conflict of interest laws are to be thoroughly investigated. The investigation is to be sufficient to establish proof or the absence of proof of a complaint or to show clearly that the issue cannot be resolved. If the investigation results in proof of an offense, the Manual states that the offender should be prosecuted unless there are "strong reasons" not to prosecute. The offender's failure to profit from his or her crime, and the fact that the offense did not involve fraud against the government are not, by themselves, appropriate reasons for declining to prosecute conflict of interest crimes. On the other hand, the clear likelihood that a petit jury would acquit the offender or the sufficiency of an administrative disposition of the matter are listed as reasons justifying a decision against prosecution.

This last point, the possibility of administrative action, deserves special mention. For most offenses in the criminal code administrative punishment is unavailable and indeed for many types of crimes such punishment would be inappropriate. By contrast, punishment by a public official's employing agency provides an effective substitute for criminal prosecution in many cases, and pursuant to the provisions of subsection 207(j) meaningful administrative penalties may be imposed even against former employees who violate Section 207. I might note, Mr. Chairman, that our efforts to make the agencies fully aware of the provisions of subsection 207(j) may result in increased use of this administrative remedy.

Finally, I would like to think that a reason that few prosecutable conflicts of interest cases are referred is that, as noted, the various departments and agencies of the executive branch have ethics programs designed to ensure that executive officials do not violate federal conflicts of interests laws.

Memorandum of Agreement

Finally, the Subcommittee has requested that we address issues relating to a Memorandum of Agreement, effective May 19, 1980, involving the OGE, the Office of Legal Counsel, and the Criminal Division. The memorandum relates to the OGE's responsibility for rendering formal advisory opinions. Under the terms of that agreement, the OGE will consult with the Criminal Division before rendering any advisory opinion on an actual or apparent violation of any conflicts of interest law. If a decision to undertake a criminal investigation is made, the OGE will refrain from issuing any opinion until a prosecutive decision has been made. Similarly, when a formal advisory opinion is sought in a matter not involving an actual or apparent violation of the law, but which raises an important matter of first impression, the OGE has agreed to consult the Department of Justice's Office of Legal Counsel before issuing any opinion.

The importance of the agreement to federal prosecutors is that once a formal advisory opinion has been issued, a person who is involved in the transaction or activity in question, or in a materially identical transaction or activity, and who relies upon the advisory opinion in good faith, is not subject to prosecution under the conflicts of interest statutes.

The Subcommittee's letter states that this agreement has led to lengthy delays in resolving cases administratively; the Subcommittee asks how the administrative aspects of ethics cases may be resolved while a criminal investigation is pending.

We do not believe that the coordination of administrative and criminal proceedings relating to alleged conflicts of interest law violations presents significant problems unique to the ethics area. The issue of deferring administrative action in the context of a criminal investigation is present in a broad range of cases involving alleged violations of federal criminal laws on the part of federal government employees, particularly where the alleged criminal conduct is directly related to official responsibilities. For example, the issue routinely arises in cases involving alleged violations of 18 U.S.C. 641, theft of government property; 18 U.S.C. 287, false claims against the government; 18 U.S.C. 1001, making a false statement; and 18 U.S.C. 1623, perjury.

The appropriate scope of administrative inquiry in the context of an ongoing criminal investigation of federal officers and employees is addressed in the guidelines, which I discussed earlier, issued by former Attorney General Edward Levi and former Attorney General Benjamin R. Civiletti. In this regard, the essential point of the memoranda is that an administrative inquiry should not compromise the integrity of a criminal investigation and thereby undermine the possibility of successful criminal prosecution.

Former Attorney General Levi's memorandum emphasizes the need for independent administrative investigation or disciplinary action to be coordinated with the Department to ensure that the criminal investigation is not jeopardized. Former Attorney General Civiletti's memorandum relates principally to procedures whereby, during the course of an ongoing criminal investigation, agencies may obtain statements from those involved in alleged criminal misconduct. Generally, an agency is not bound by a prosecutor's request that administrative action be deferred.

That administrative actions may be delayed during the pendency of a criminal investigation is the unavoidable consequence of the decision that criminal remedies should be pursued where appropriate. Of course a criminal investigation can sometimes help in taking administrative action since at least some of the information obtained during the course of a criminal investigation may prove relevant to a subsequent administrative resolution.

Moreover, not all administrative action relating to a criminal investigation would necessarily compromise the criminal investigation. Communication between the agency concerned and the prosecutor is crucial. An agency interested in proceeding administratively should ask that the prosecutor evaluate the proposed administrative action in light of the concerns of the agency, the probable impact on the criminal investigation, and the likelihood and significance of criminal prosecution. I can assure you, Mr. Chairman, that we encourage agencies to bring relevant administrative considerations to our attention. Only through communication can such issues possibly be resolved, whether involving violation of conflicts of interest laws or violations of other federal criminal laws.

Mr. Chairman, that concludes my prepared remarks and I would be pleased to attempt to answer any question that you may have.

ETHICS IN GOVERNMENT

Testimony of Michael Josephson of
the Josephson Institute for the Advancement of Ethics
before the Subcommittee on Oversight of Government Management
of the Senate Governmental Affairs Committee
April 12, 1988, Washington, D.C.

My name is Michael Josephson and I am president of the Josephson Institute for the Advancement of Ethics. I am very pleased to testify today concerning my views on and experiences with ethics trainings for public sector professionals and to give some opinions and comments on how the government could more effectively establish a positive ethical environment.

BACKGROUND

The Josephson Institute for the Advancement of Ethics is the operational division of the Joseph and Edna Josephson Foundation, a nonprofit, tax-exempt, public benefit corporation established to increase the ethical quality of the conduct in society, especially in the fields of government, journalism, law, medicine, education, business and accounting. The Josephson Institute publishes a magazine,"Ethics; Easier Said Than Done" and has offered an extensive array of programs including ethical decision making trainings for public sector professionals (including senior staff persons for the United States Senate and California Legislature), journalists (including in-house programs for the Philadelphia Inquirer and the San Jose Mercury News), business and nonprofit organizations.

In order to respond to the substantial and growing demand for programs and assistance in the public sector, the Institute formed the **Government Ethics Center**. The Center's educational unit offers ethical decision making seminars, workshops and conferences for elected officials, government administrators and their staffs and will publish comprehensive and practical decision making guidelines for public sector professionals. In upcoming months, the Institute will offer programs for state legislative leaders (in conjunction with the State Legislative Leaders Foundation), for mayors (with the United States Conference of Mayors), state legislators (with the National Conference of State Legislatures), senior staff of the California Senate and Assembly, and senior staff of the U.S. Senate and House of Representatives.

The Center is directed by a Commission of prominent former public officials, political commentators, and academics. The Commission consists of: **Richard Bolling**, former Congressman; **Hodding Carter III**, journalist, former State Department spokesman; **Linda Chavez,** president, U.S. English, former White House liaison; **H. George Frederickson**, professor of public administration, University of Kansas; **Edwin Guthman**, professor of journalism, U.S.C., Pulitzer Prize winner, former editor, Philadelphia Inquirer and Los Angeles Times, former Justice Department spokesman; **Barbara Jordan**, professor, LBJ School of Public Affairs, U. of Texas, former Congresswoman; **Marvin Kalb**, director, Center for Press, Politics, and Public Policy, Harvard, former NBC correspondent; **Arthur R. Miller**, professor of law, Harvard, ABC legal commentator; **Lew Murphy**, former four term Mayor of Tucson, Arizona: **Albert Quie**, former Congressman, former Governor of Minnesota; **Richard Schubert**, president, the American Red Cross, former Labor Department executive; **Richard Thornburgh**, director, Institute for Politics, Kennedy School of Government, former Governor of Pennsylvania; **Paul Warnke**, lawyer, former chief U.S. arms control negotiator, **Joan Hoff-Wilson**, professor of history, American University; and **Alfred Zuk**, executive director, National Association of Schools of Public Affairs and Administration.

The Center has established formal links with most of the major organizations concerned with government. Affiliate organizations are the: **American Federation of State, County, and Municipal Employees** (AFSCME); **American Society for Public Administration** (ASPA); **International City Management Association** (ICMA); **National Association of State Budget Officers** (NASBO); **National Conference of Christians and Jews**; **National Conference of State Legislatures**; **National League of Cities**; **State Legislative Leaders Foundation**; and **United States Conference of Mayors.**

INTRODUCTION

Congress obviously must evaluate the effectiveness of present ethics laws in the context of actual experience over the past ten years and the present state of public dismay over the state of ethics in government. In making that evaluation, I hope that the systemic causes of misconduct and low moral morale will be considered. The problems are pervasive and enormously important and they cannot be solved by laws which seek to coerce public employees to virtue by forbidding wrongdoing.

I am not suggesting that laws are inappropriate or useless. To the contrary, I favor thoughtful laws which establish minimal standards of behavior for those who lack the sensitivity or moral fibre to avoid behavior which compromises the integrity of the government itself. Well crafted laws can prevent some excesses, deter bad judgment and provide a basis for deterring and sanctioning corrupt and other improper practices.

I am suggesting that such laws should be only a part of a broader effort to create an environment, an ethical culture, which fosters genuine commitment to ethics and to educate persons in authority to make effective ethical decisions.

ESTABLISHING AN ENVIRONMENT THAT FOSTERS ETHICAL CONDUCT.

Organizational Cultures. Most organizations develop an environmental culture which reflects the primary values of the organization and the motivations of those who control it. The ethical quality of the culture is a result of the importance attached in the operational decision making process to fundamental ethical values.

Changing the Culture of an Organization. Cultures tend to develop by evolution rather than revolution. Over time, modes of thinking and behavior, and the values they reflect, become entrenched as unstated assumptions making them difficult to alter. The process of change, however, can be energized by three major factors:

1. **External Forces**--such as: a) *laws*, b) *policy statements by the President and other high administration officials* (if they are perceived as meaningful commitments rather than public relations), c) *resource allocation* (the importance most government workers attach to stated goals and values is usually determined by the amount of resources, including time and energy, devoted to it), and d) *public sentiment* (usually

expressed by the media in reaction to publicized activities).

2. **Internal Policies and Procedures**--most organizations of significant size develop: a) *formal rules and regulations* which prescribe general standards of conduct and specific policies to guide decision making (the Standards of Conduct promulgated by the U.S. Department of Health and Human Services is an outstanding example), and b) *informal operational policies* which control actual decision making (this includes the approach management takes toward enforcement of ethics policies and the extent to which those in authority are willing to honor and advance ethical values in situations where it is costly, inconvenient and politically inexpedient to do so).

3. **Individual Action**--even massive organizations can be influenced by the actions (from leadership by example to whistle blowing) of individuals who exercise moral autonomy and seek to influence the behavior and policies. The ethical culture of an organization is both affected by and a function of its ability to deal with and accommodate ethical controversies and individual consciences.

Establishing a More Ethical Culture in the Federal Government. Efforts to increase the ethical tone and culture of federal employees are complicated by the fact that there are different classes of public employees. Persons who intend to make a career out of public service are generally more aware of and receptive to ethical principles which limit their behavior. On the other hand, persons who see government service as a stepping stone to more lucrative jobs in the private sector and political appointees who come from and plan to go back to private enterprise, are often less informed and less receptive to ethical rules.

THE VALUES AND LIMITS OF LEGISLATION AND RULES.

Laws Establish Minimal Standards of Behavior. The public trust is so important and so fragile that it is essential to establish baseline standards of behavior to prevent conduct that would injure such trust. Laws are especially appropriate concerning the use of public funds, property, facilities and influence and in safeguarding the independence of public officials by specifying unacceptable forms of conflicts of interest. Referring to such laws as "ethics laws," however, is misleading and counter productive. It is misleading because the laws only deal with a narrow spectrum of ethical issues confronting public sector professionals. It is counter productive because it invites those subject to the regulations to treat the minimalist laws as standards of ethical propriety and encourages a legalistic approach to ethics which honors no more than the letter of the law. Laws concerned with establishing minimal standards of behavior ought to be given more narrow titles, such as the Federal Conflicts of Interest Act.

"Politics is a place of humble hopes and strangely modest requirements, where all are good who are not criminal and all are wise who are not ridiculously otherwise."
--Frank Moore Colby

The Ethics/Law Fallacy. Although a thoughtful statutory scheme is a crucial ingredient of a comprehensive ethics program, laws should not be overemphasized. A common fallacy, especially prevalent in government circles, is "If it's legal, it's ethical." Thus, a person who is not convicted or is unindictable is supposedly vindicated of all wrongdoing. This is nonsense. Laws and rules do not describe what an ethical person *ought* to do. Instead, they establish minimal standards of consensus impropriety. Persons are not "ethical" simply because they act lawfully. One can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law. Ethical persons measure their conduct by basic ethical principles rather than by laws and rules; they do not walk the line of propriety; they do more than they have to and less than they are allowed to.

The Caesar's Wife Rule: Be Beyond Reproach. Although the concept has been challenged recently, a fundamental principle of ethics which should guide the behavior of all persons who excercise public power is the notion of *avoiding even the appearance of impropriety*. In matters of public trust and confidence, appearances are crucial. The public must have no doubt that government employees will exercise their authority fairly and impartially, unfettered by influences of personal relationships, financial incentives or ideological commitments. This concern is at the root of conflict of interests rules but it is much bigger than the individual rules. In effect, the rules are simply nonexclusive illustrations of matters which appear to be improper and are, therefore, forbidden. Any legislative or training scheme designed to deal with ethics in government should stress the importance and pervasiveness of the notion that, like Caesar's wife, the public official must be beyond reproach.

Affirmative Dimension of Ethics. So-called ethics laws focus entirely on the negative dimension of ethics by defining forbidden conduct. An unstated premise is that a person is ethical so long as those prohibitions are not violated. This approach unduly narrows the range of ethical considerations. In fact, being ethical involves more than staying out of trouble. There is an affirmative dimension of ethics which focuses on producing good rather than on forbidding bad. It is concerned with *rightdoing*. A comprehensive approach to ethics ought to supplement laws with programs and policies designed to encourage a positive attitude about ethics. It should help public officials recognize and take advantage of opportunities to be honest, helpful, fair and accountable, to be a positive influence and set a laudatory example. We cannot require it by law, but we ought to prod and inspire government employees to view their ethical obligations in broad and affirmative terms.

The Power of Self Interest. Laws seeking to regulate conflicts of interest and the undue use of influence on former associates and subordinates, restrict behavior in a very significant way. They severely (though, not unreasonably) limit earning opportunities and, they generate in many, an instinctive siege mentality which perceives the rules as unwarranted, technical and senseless intrusions into private domains. Some view the laws as personal insults to their integrity. Thus, one has to expect the laws to be subject to legalistic interpretations which seek loopholes and ambiguities. Efforts should be made in drafting the laws and in supplementing them with materials and trainings to discourage a resort to legalistic attack-mode reasoning. Federal employees should be encouraged to look at ethical principles in terms of their broader purpose and inherent validity.

Special Problems With Ethics Laws. Laws must be crafted and promulgated in a way which consciously seeks to avoid the following common problems with ethics rules:

> 1. **Enforcement Imperative.** If a matter is important enough for a law, it must be important enough to enforce *consistently, fairly* and *expeditiously*. In the past, the Office of Government Ethics has not earned a reputation as a serious enforcer of federal laws. Whether this is a result of lack of zeal or a shortage of resources, the fact remains that weak or sporadic enforcement discredits the rules and eliminates both

their moral force and deterrent capacity. Unless legislation provides structures and resources to assure vigilant enforcement, Congress will appear to be hypocritical and insincere creating still another dimension of the overall ethics problem.

2. **Clarity.** All laws must be clear but this is especially important in the area of ethics regulation. If the rules are so complicated or ambiguous that they can be easily misunderstood or misinterpreted, they will be the subject of ridicule and contempt, regardless of the validity of the underlying policies. For example, the present system of compartmentalization is unduly complex and, in application, creates silly results. Simpler and broader rules stressing the underlying notions of independence and the avoidance of even the appearance of impropriety might be more effective.

3. **Practicality.** Laws must reflect an understanding of practical realities and not impose unworkable or unduly cumbersome requirements. Similarly, they must recognize the need for occasional de minimis or emergency variations (e.g., personal phone calls on government phones). Although providing "slack" makes it easier for bad faith violations, unduly strict rules are not effective against such persons either. In addition, unrealistic prohibitions simply make lawbreakers out of fundamentally honest persons. Rules with a clearly stated purpose and guidelines for interpretation give discretion to supervisors to interpret and apply them, thereby creating the kind of accountability necessary to an ethical culture.

4. **Fairness.** Laws must not unfairly discriminate against essentially similarly situated groups. They should apply to public officials and staffs in both the executive and legislative branch and must not create exemptions that are not clearly justifiable in the eyes of those who are expected to comply with the rules. Present laws make facially unjustifiable distinctions (e.g., regarding the compartmentalization of certain departments). In addition , the fact that no similar restrictions apply to the legislative branch generates charges of hypocrisy and unfairness which undermine the moral authority of the rules. Present government ethics laws do not meet this criteria.

TWO-SIDED LAWS. One aspect of present laws impose limitations and sanctions on former government employees who lobby their former colleagues. The laws could be made considerably more effective if they impose reporting and refusal obligations on the persons lobbied. The ex employee has significant financial incentives to push or cross the lines of legality but those still in government have no incentives to compromise their integrity. Thus, substantial deterrence could be added by making some of these laws two-sided.

A MODEL TRAINING PROGRAM.

Threshold Question: Can Ethics Trainings Affect Behavior? Before one embarks on any kind of ethics oriented training program, certain threshold assumptions must be dealt with. It is generally assumed that ethics is something people either have or haven't. If they have it, they got it early in life and they will be ethical; if they don't have it, they'll never get it and they will be unethical. Allied to these beliefs is the idea that ethics can't be taught to adults and, therefore, that ethics education is a futile and foolish endeavor. It is important to put all these false beliefs to rest.

Extensive research by educational psychologists and the Josephson Institute's recent training experiences demonstrate that an approach which focuses on principled reasoning and decision making can have a material affect on attitudes and behavior. The purpose of an adult ethics training program is not to develop character or inculcate unfamiliar values but to help participants develop attitudes and proficiencies necessary to ethical conduct.

Evidence That Programs Affect Behavior. An overt goal of ethics trainings is to affect attitudes and actions by enhancing the desire and ability to perceive and deal with ethical issues. Our experience supports the conclusion that a federal training program could significantly increase ethical decisions and behavior. Individual comments and comprehensive post course surveys demonstrate that participants consistently felt that the programs were worthwhile and that, as a result of what they learned, they were likely to make decisions differently. In fact, in immediate post course surveys, 60-70% of the participants reported that they would make decisions differently as a result of what they learned. The Institute intends to conduct follow-up studies to see if persons *actually* do make different decisions. We have conducted one such study, with the group senior staffers from the U.S. Senate, and it indicates that the attitudinal changes reported by most of the participants did, in fact, affect their conduct and that they are real and lasting. About three months after the workshop, almost 30% stated that they already made some decisions differently and just under 50% said they probably had.

Continuity and Personal Involvement. In view of the 50-60 hour work week of most of these men and women, another form of impressive evidence of the value of the programs is provided by their desire to continue the dialogue we began and their willingness to invest substantial time helping us reach others in Washington. Almost all of those responding expressed an interest in regular meetings to reinforce and extend their own ethical concerns, and 14 of the senior staffers volunteered to form an Advisory Council to work with the Institute to design and organize similar programs for their colleagues and for members of the executive branch.

Personal Evaluations. Another form of evidence that the programs are valuable is provided by the comments and evaluations of those who participated in the programs. A sample of comments follow: **Roy Greenaway**, Administrative Assistant to Senator Alan Cranston, *"It totally convinced me that explicit discussion of ethics in the political decision making process is as necessary as it is unusual."* **Ira Shapiro**, former Administrative Assistant to Senator John D. Rockefeller IV, *"Without being particularly preachy, [the program] managed to make me and others face up to certain assumptions and rationalizations that we don't ordinarily look at too closely. Skepticism of 'insider' justifications; of the notion that 'everyone does it'; and the perennial problem of the 'ends justifying the means' were all important points. In my experience, the people working in the Senate have maintained unusually high ethical standards....But the work is hard, and the stakes are high, and there is always a chance of sliding down the slippery slope unless you are willing to engage in some reflection and pretty tough self-examination. The course helps insure that we'll do that."* **Howard Propst**, Administrative Assistant to Senator William Armstrong, *"When you participate in a Josephson Seminar, you gain a new appreciation for the importance of ethics in the decision making process in government. The seminar is well structured to demonstrate that ethical values and principles are not abstract goals, but crucial ingredients of our self-governmental system. . . ."* **Allen Moore**, Undersecretary Designate, International Trade Administration, Department of Commerce (former Minority Counsel to the Committee on Commerce, Science and Transportation), [the ethics workshop helped] *"create a structure, a focus on the kinds of* *ethical tensions and pressures one is often faced with."* **Scott Bunton**, Senator Timothy Wirth's Chief of Staff: *"It was a fascinating and thought provoking session."* **Elisabeth Kersten**, Director, California Senate Office of Research, *"Your presentation, style, humor, and practical approach, coupled with a theoretical framework, made the session beneficial for us all."* **Bayard L. Catron**, Professor, George Washington University, *"[The Insitute's] training approach is first rate on all counts. It is well structured, with much small group work and excellent cases. . . .I would confidently recommend [t]his ethics training for other groups of public administrators."*

It is clearly possible then, to engage experienced and important public sector professionals in an educational experience that addresses ethical decision making in a practical way. More important, it is clear that such programs can have a significant impact in affecting decisions and increasing the ethical consciousness and commitment of participants.

THE GOALS OF AN ETHICS TRAINING PROGRAM

A effective ethics training program for federal employees ought to have clear and explicit goals.

Individual Education. The first is to educate individual public officials about the rules, values and ethical principles which should guide their behavior and enhance their willingness and ability to abide by those standards. As discussed more fully below, ethics training will be most effective if it incorporates elements of *inspiration, collaboration, education,* and *integration.*

Establishing an Ethical Environment. The second major goal of an ethics program is an extension of the first but it is even more important. The goal is to foster an environment where persons are inspired to willingly adopt and live up to high principles of professional conscience so that they voluntarily forgo opportunities for private gain and sacrifice narrow self interest in order to promote public trust and confidence in the government. Establishing a cooperative, collaborative attitude about ethics is crucial because it takes pressure off outside enforcement and deterrence systems and draws upon a collective conscience to discourage wrongdoing and encourage the affirmative aspects of ethics.

Who Can Conduct the Training Programs? Educational programs that attempt to affect attitudes and conduct need to be considerably more sophisticated than those that simply intend to convey knowledge. The process must be more intimate, personal and interactive. While not everyone can be an effective trainer, the skills needed by an ethical decision making trainer are teachable. A broad federal program should include training for the trainers. The most important qualities of an effective ethics trainer are a facile and open mind, an ability to converse intelligently about the practical realities of government work and a sincere personal commitment to ethical values. The pedagogical, psychological and philosophical dimensions of the training can be taught in a week or so to someone with no background in ethics education.

STRATEGIES OF EFFECTIVE ETHICS TRAINING

The Josephson Institute's training programs consciously employ three strategies:

1. Increase Ethical Consciousness. A critical dimension of ethics education focuses on the general notion of awareness. A significant amount of ethically inappropriate conduct is

not the result of conscious selfishness or greed but of insensitivity to the nature and scope of one's ethical obligations and opportunities. Often, people simply are "blindsided" by consequences they never anticipated. The need to avoid even the appearance of impropriety, for example, requires persons to think about and understand how certain conduct that they know to be innocent will look to others who are not privy to the private information and motives of the public official. This ability is not natural in everyone, it must be developed.

Conscious training strategies should be employed to enhance the ability to anticipate and evaluate the practical and moral issues arising from decisions. One important method encourages the decision maker to systematically analyze the potential consequences of various choices in terms of their impact on all the persons who will be affected by the decision. These persons are called stakeholders.

2. Increase Ethical Commitment. A more difficult task concerns the development and enhancement of the *desire* to act properly and safeguard the public trust by willingly avoiding even the appearance of impropriety. The problem is that it is easy to fall into a pattern of moralizing and sermonizing, methods that rarely work and often generate resistance and resentment (no one likes to be "should" upon). Thus, without being preachy, the program should consciously seek to inspire and motivate individuals to put a higher priority on ethical values. Most people want to be ethical. The crucial point is that ethics trainings ought to build on rather than try to change human nature. By bringing public officials in closer contact with the moral values they already possess and the idealistic reasons that drew them to the public sector, the government can encourage and support decisions to pursue those values in their daily activities.

3. Increase Ethical Competencies. Seeing the ethical issues (ethical consciousness) and wanting to do the right thing (ethical commitment) is not enough to insure ethical conduct. There is still the matter of *doing* ethics and, as the name of our magazine suggests, ethics is "easier said than done." To assure that persons follow through on ethical decisions, an effective training program ought to develop and enhance proficiencies of reasoning and problem solving essential to ethical conduct.

> Reasoning and Judgment Skills--enhance the ability to make practical ethical judgments by teaching ways of more accurately predicting the likely consequences of decisions. Many people overestimate the costs of being ethical and underestimate the costs of compromising ethical values. In addition, decisions which involve deceit or secrecy often create collateral risks that are often not seen or properly evaluated.
>
> Problem-Solving and Implementation--improve proficiency in creative, realistic problem-solving by teaching methods of developing alternative solutions and methods of implementing them. Many public sector professionals fail to choose the "high road" because they believe that the consequences of the ethical decision are too costly. Programs should provide structures and approaches that will help an ethically committed person handle a matter so as to minimize or eliminate undesired results.

METHODS OF EFFECTIVE ETHICS TRAINING

Each of the following methods should be incorporated into a full fledged effort to increase the ethical quality of government behavior:

1. Inspiration. Though it is not enough to invoke people to ethics, statements and encouragement by persons in ultimate authority about the importance they attach to ethics could be an important part of a comprehensive ethics program. If the statements are realistic and believable, they can stimulate and excite the conscience and persuade individuals that being ethical is part of their job, that it is one of the things that their bosses expect and desire. Inspirational techniques can also stress the nature and importance of self esteem, a purposeful life and individual moral potential and accountability.

The message ought to be that one does not have to be sick to get better, that government service is most rewarding when it is performed with total integrity and that it is important that each person do his or her share to improve and maintain the image and reality of ethical government. The purpose is to build a collective pride in the enterprise of government and the particular unit in which the individual operates.

In private companies, statements by the CEO, Divisional Chiefs and immediate superiors are important in establishing the ethical tone of the organization. Obviously, if they are not supported by operational values and practices they will be dismissed as pure public relations hypocrisy. If, however, they are part of a genuine effort to create an ethical culture they can be effective. I think the same principles apply to government.

The government is in a particularly appropriate position to draw on notions of leadership. If I were designing a program for the federal government I would seek to get video tapes of a short but sincere statement of public values from the President and the Cabinet officer of the relevant agency or department. I would also seek to include live invocations by more immediate supervisors and by former employees who have moved on but who are willing to share their perspective about the nature of ethical challenges.

2. Collaboration. In order for an ethics program to really take hold, it should come from within an organization and not be imposed *in toto* from without. The concept of collaboration to develop workable policies is important.

The first task is to *unify* individuals within each government entity by demonstrating and appealing to the common interest all employees have in ethical behavior of everyone in the organization. Group meetings and meetings with representative employees to develop a spirit of community and mutuality are important. It is to everyone's advantage that persons in government be and be perceived to be ethical and that point should be stressed and developed.

The second task is to *identify* from within the organization a comprehensive list of the practical pressures and factors which create ethical problems and to *clarify* the entity's goals and purposes with respect to the problem areas identified. This assures that policies and procedures are relevant and responsive to the actual needs of the organization. Persons within the organization and those served by it ought to be surveyed systematically to discover ethical problems and issues.

The final task is to *specify* minimal standards of behavior for common situations, guidelines for analysis and decision making in matters not specified, and clear statements of the ethical values and principles underlying the standards and guidelines.

3. Education. Serious (but not sanctimonious) orientation and reinforcement programs should be designed to produce: *knowledge* of applicable laws and internal rules and policies; *understanding* of the underlying values and ethical principles; the ability to *apply* rules, standards, guidelines, and values to specific decision making situations and *positive ethical attitudes* including a sense of personal accountability and individual moral autonomy.

4. Integration. Finally, a comprehensive ethics program should incorporate creative devices to reinforce positive ethical behavior and discourage improper conduct by: including issues of ethical sensitivity and performance in the recruiting, hiring, and promotion decisions, developing means of acknowledging and rewarding ethical conduct and sanctioning unethical conduct in a manner likely to affect decision making and establishing methods of communication and discussion of ethical problems and strategies for dealing with them.

FUNDAMENTALS OF ETHICS ANALYSIS

There is a substantive base to programs seeking to enhance ethical consciousness, commitment and competence. This base includes fundamental definitions and the articulation of ethical values and principles.

Definitions

Ethics--a system or code of conduct based on moral duties and obligations which indicate how we should behave; it deals with the ability to distinguish right from wrong and the commitment to do what is right.

Morals--what is good and right in character and conduct. The term is essentially interchangeable with ethics, though in common usage, "morality" often implies particular dogmatic views of propriety, especially as to sexual and religious matters. Since the term ethics does not carry these same connotations, it is more neutral.

Personal Ethics--an individual's *operational* code of ethics based on personal values and beliefs as to what is right or good.

Values--core beliefs which guide or motivates attitudes and actions.

Nonethical Values--ethically neutral values like wealth, security, comfort, prestige and approval. They are not necessarily inconsistent with ethical values, but often there is a conflict.

Ethical Values--beliefs like honesty and fairness which are inherently concerned with what is intrinsically good or right and the way one should act.

Consensus Ethical Values--the study of history, philosophy and religion reveal a strong consensus as to certain universal and timeless values essential to the ethical life:

1) *Honesty*
2) *Integrity*
3) *Promise-Keeping*
4) *Fidelity*
5) *Fairness*
6) *Caring for Others*
7) *Respect for Others*
8) *Responsible Citizenship*
9) *Pursuit of Excellence*
10) *Accountability*

Ethical Principles--standards or rules describing the kind of behavior an ethical person should and should not engage in. For example, the value of honesty translates into principles demanding truthfulness and candor and forbidding deception and cheating.

ETHICAL VALUES AND PRINCIPLES

This list of ethical principles incorporates the characteristics and values that most people associate with ethical behavior. An ethical decision systematically considers which, if any, of the following principles are involved. It places ethical values above nonethical ones and, where necessary, prioritizes among ethical values.

Honesty. Honest persons are ***truthful, sincere, forthright, straightforward, frank, candid***; they do not ***cheat, steal, lie, deceive***, or act ***deviously***.

Integrity. Persons with integrity are ***principled, honorable*** and ***upright***; they are ***courageous*** and ***act on convictions***; they will ***fight for their beliefs*** and will not adopt an ***ends justifies the means*** philosophy that ignores principle or be ***expedient at the expense of principle***, be ***two-faced***, or ***unscrupulous***.

Promise-Keeping. Persons worthy of trust ***keep promises, fulfill commitments, abide by the spirit as well as the letter of an agreement***; they do not interpret agreements in an ***unreasonably technical or legalistic manner*** in order to rationalize noncompliance or create justifications for escaping their commitments.

Fidelity. Persons worthy of trust demonstrate ***fidelity*** and ***loyalty*** and they do not ***use or disclose information learned in confidence***; in a professional context, they ***safeguard the ability to make independent professional judgments*** by scrupulously ***avoiding undue influences and conflicts of interest***.

Fairness. Fair persons manifest a commitment to ***justice***, the ***equal treatment*** of individuals, ***tolerance for and acceptance of diversity***, and they are ***open-minded***; they are willing to ***admit they are wrong*** and, where appropriate, ***change their positions and beliefs***; they do not ***overreach*** or ***take undue advantage of another's mistakes or difficulties***.

Caring. Concern for the well-being of others manifests itself in ***compassion, giving, kindness*** and ***serving***; it requires one to attempt to ***help those in need*** and to ***avoid harming others***.

Respect. Ethical persons demonstrate ***respect for human dignity, privacy***, and ***the right to self determination of all competent adults***; they are ***courteous***, and ***decent***; they ***provide others with the information they need to make informed decisions about their own lives***.

Citizenship. In a democracy, ***responsible citizenship*** is an ethical obligation; it involves ***lawfulness*** (abiding by laws and rules of society), ***participation*** (by voting and expressing informed views), ***social consciousness*** and ***public service***; public sector professionals have the additional responsibility of ***encouraging participation of others*** and a special obligation to ***respect*** and ***honor democratic processes of decision making*** and ***avoiding unnecessary secrecy*** or ***concealment of information***, and ***assuring that the citizenry has all the information needed to exercise responsible citizenship***.

Excellence. Ethical persons are concerned with the ***quality of their work***; they ***pursue excellence***, they are ***diligent, reliable, industrious***, and ***committed***. A public sector professional must be ***well informed*** and ***well prepared to exercise public authority***.

Accountability. Ethical persons ***accept responsibility for decisions***, for the ***foreseeable consequences of their actions and inactions***, and for ***setting an example for others***. Persons in the public sector have special obligations to ***lead by example***, to ***safeguard and advance the integrity and reputation of the legislative process***, to ***avoid even the appearance of impropriety***, and to ***take whatever actions are necessary to correct or prevent inappropriate conduct of others***.

Additional Ethical Values for Public Sector Professionals.

In addition to adhering to fundamental ethical values and principles applicable to all persons (honesty, integrity, promise-keeping, fidelity, fairness, caring, respect, citizenship, excellence, and accountability), persons working in government have additional ethical obligations including:

- **Independence.** Those who exercise public authority often act in a quasi-judicial capacity. In order to maintain public confidence that such power is and will be exercised impartially and fairly, it is essential that public officials safeguard their ability to exercise independent judgment on all matters by avoiding undue influences and conflicts of interest.

- **Openness.** In a democracy, government actions and decision making should be as open as is reasonably possible so that citizens have the information they need to exercise their rights intelligently. Thus, public officials must respect the autonomy and right of self determination of the electorate by avoid unnecessary secrecy or concealment of information.

- **Confidentiality.** Although most matters can and should be open to public scrutiny, there are times when public officials obtain information that must be kept confidential. In such cases, there is an ethical obligation to maintain professional confidences and not use or disclose information for personal or political advantage.

- **Leadership by Example.** Persons in government have a special opportunity and obligation to set positive examples for their colleagues and the citizenry. They should safeguard the reputation of government; engage in no conduct that might undermine public respect; take whatever actions are necessary to correct or prevent inappropriate conduct of other public officials.

- **Avoidance of the Appearance of Impropriety.** Because of the unique importance of credibility and public trust, government employees must avoid even the appearance of impropriety.

DOUBLE STANDARDS

Many persons establish a double standard of ethics--one for their personal lives and another for their jobs. This moral duality is often the result of unchallenged suppositions about what is *necessary* and, therefore, *proper* for professional success and it tends to produce rationalizations justifying departure from ordinary ethical principles such as honesty, promise-keeping, fairness, caring, respect for others and accountability in order to achieve occupational tasks. Almost always, the "occupational ethics" permits fundamentally decent people to do things that they would not do in other contexts.

In adopting standards of behavior that justify violation of universal ethical principles, professionals frequently assert some grand and important social value which, they contend, overrides the moral obligation to strictly conform their conduct to ethical principles. Thus, many professionals adopt an "end justifies the means" operational ethic: lawyers embrace a blindly partisan model of the adversary system which elevates the interests of a client above all others; politicians accept the need to compromise certain ethical niceties to gain and maintain power as a prerequisite for carrying out their positive social policies and journalists are apt to wrap themselves in the First Amendment and the "people's right to know" as a justification for ethically dubious methods of gathering and reporting the news. Public employees are particularly apt to invoke necessity arguments to cope with entrenched bureaucracies, political manipulations and a shortage of resources.

The fact is it is hard to live up to scrupulous standards of ethics in contexts where the norm of behavior is often considerably lower than the ideal and where the stakes are high. Nevertheless, objective perspectives do not support the dichotomy between private and "business ethics" as either necessary or justifiable. To the contrary, it is both possible and important that personal and professional ethics be parallel and consistent.

In many cases, public sector professionals resort to deception, distortion, manipulation of others by withholding or concealing information, evasion of commitments, and invasions of another's privacy or autonomy as ethical shortcuts to "doing their job." The pressures to do so are real and everpresent. The purpose of ethical decision making programs is to help individuals rediscover the principle of moral autonomy which makes us all accountable for the consequences we produce and the methods we use to produce them.

THE PROCESS OF ETHICAL DECISION MAKING

We cannot solve all problems by resort to some mechanistic formula, but we can be more effective if we have a structure. A process which systematically takes into account the ethical principles involved in a decision tends to prevent inadvertent unethical conduct and allows us to consciously choose which values to advance, who to aid and who to harm.

When one is in the trenches, it is difficult, if not impossible, to analyze problems fully and objectively. While most people do not want more rules telling them what to do, they do want assistance in perceiving the ethical implications of their decisions and in developing realistic, morally-centered approaches for resolving ethical dilemmas.

Ethical decision making refers to a process of choosing (i.e., principled reasoning) which systematically considers and evaluates alternate courses of conduct in terms of the list of ethical principles. It does not proceed on the assumption that there is a single "right" answer to most problems. To the contrary, it recognizes that though some responses would be unethical, in most situations, there are a number of ethical ways of dealing with a situation.

In the "real world" there are many shades of gray, even in routine decisions. And, since most decisions have to be made in the context of economic, professional and social pressures which compete with ethical goals and conceal or confuse the moral issues, ethics is easier said than done. The first task of ethical decision making is to distinguish ethical from unethical responses; the second, is to choose the best response from the ethically appropriate ones--although there may be several ethical responses to a situation, all are not equal.

Making the distinctions necessary is much more difficult and complex than is normally thought because, in so many situations, there are a multitude of competing interests and values and crucial facts are unknown or ambiguous. Since our actions are likely to benefit some at the expense of others, ethical decision makers attempt to foresee predict the likely consequences of their actions.

MODELS FOR ETHICAL DECISION MAKING

A major concern of philosophers and theologians throughout recorded history has been the development of coherent theories which describe the nature of moral obligation and provide guidance for determining those obligations in specific situations. On the one hand, there is something inherently implausible about expecting a public official in the trenches to think about or apply abstract ethical theories. On the other hand, reliance on unstructured and untutored intuition to resolve ethical issues that may well have dramatic and lasting effect on individuals and society is not prudent. In the following pages, I have summarized three important and intrinsically useful approaches to ethical decision making and propose a fourth system which can provide a practical guide to determining and doing the "right" thing.

The Golden Rule. The most basic and useful ethical theory is the Golden Rule: "Do unto others as you would have them do unto you." Sometimes called the "Rule of Reciprocity," this simple guide to behavior establishes an essential and irreducible aspect of ethics: ***a good person is concerned with and responsible for the well being of others.*** Thus, ethical persons are benevolent and their decisions take into account the interests of all those they affect. They seek to help others when they can and refrain from causing avoidable harm.

The Golden Rule asks us to place ourselves in the position of those who will be helped or harmed by an act and to treat others as we would want to be treated in a similar situation. If you would not like to be lied to or deceived, don't lie to or deceive others. If you would want others to keep their commitments to you, keep your commitments to them. The Rule requires restraint, self discipline and even sacrifice.

Cynics claim that the Golden Rule will not work and should not apply outside a small circle of family and friends. They suggest that to survive, one must "Do unto others, *before* they do unto you." This, of course, becomes a self-fulfilling prophesy which breeds the anti-ethical "Everyone for himself" credo. The fact is that many people do not live by the Golden Rule; they do *not* treat others fairly, honestly or with compassion. The challenge of the ethically-centered person is to overcome this fact of life and do what is right in spite of, maybe even because of, the failure of others to do so.

The Golden Rule is a thought process which is as valid in making occupational decisions as it is in making personal ones. Even in difficult situations, application of the "do unto others" standard often reveals what actions are ethical and which are not. The major problem with this guide to ethics is that it is not sufficient in situations which involve a complex network of persons, all of whom will be affected in different ways. The Rule does not help us resolve conflicts among different persons and competing ethical values. For example, how does the public employee rank order the competing interests of citizens, employers, politicians and the public good? Unfortunately, the Golden Rule does not help us resolve the dilemmas produced by complex, multiple relationships.

Absolute Duties: Kant's Categorical Imperatives. Immanuel Kant developed a theory of ethics which is basically consistent with but more directive than the Golden Rule. According to Kant, ethical obligations are "higher truths" which impose ***absolute moral obligations*** which must be obeyed regardless of the consequences and in spite of social conventions and natural inclinations. The essence of Kant's view is that persons have an absolute ***duty*** to do the "right" thing on all occasions and in all situations and that what is right has nothing to do with the actual consequences produced or avoided. Two major duties emerge from Kant's theories:

> (1) *do only those acts which you are willing to allow to become universal standards of behavior applicable to all people, including yourself; and*
>
> (2) *all individuals are intrinsically important and the well being of each is a moral end in itself; never treat others as simply the means for your own gain or gratification.*

Like the Golden Rule, Kant's theory asserts the primacy of benevolence and concern for others but it goes further by specifying the nature and scope of moral obligations. Among the moral obligations that arise from the two main principles are *truthtelling, promise-keeping, helping* and *non injury*.

A major virtue of Kant's duty theory is its simplicity. It does not require or permit one to evaluate complex facts and predict consequences. Certain things are right and certain things are wrong. One does not have to be keenly analytical to be ethical. According to Kant, moral obligations are absolute, invariable and do not allow for exceptions or extenuating circumstances--these are *"categorical imperatives"*.

The difficulty with his approach is not the human values which underlie it, but its rigidity. For example, since truthtelling is always right and deception is always wrong, one cannot lie or deceive to achieve a "greater good" such as saving an innocent life from terrorists, sparing the feelings of a friend from candid opinions. All lying is wrong regardless of the motivations or goals.

While this absolutist view requires great personal discipline and commitment, it makes the resolution of real world problems clear in many situations. On the other hand, it provides unresolvable conflicts when a person faced with a real or perceived ethical dilemma--a choice between two ethical values (e.g., where telling the truth would be an act of disloyalty or would cause another emotional or physical harm or prevent the accomplishment of one's professional obligations). Thus, very few people are willing or able to operate in Kant's absolute world of duty.

Consequentialism (Utilitarianism). Most people reject Kant's absolutism in favor of a theory that allows the ethical person to weigh and evaluate competing ethical values in terms of ***consequences***. Classically referred to as ***utilitarianism*** and popularized by John Stuart Mill, this theory, also incorporates the "others-centered" approach of the Golden Rule and Kant's categorical imperatives, but it stresses a ***balancing process***; no particular ethical duty is absolute or invariable. It calls on the ethical person to consider and predict the likely consequences of contemplated conduct and weigh the good the act will produce against the harm it will cause. Simplified to "the greatest good for the greatest number," utilitarians always seeks to produce the greatest possible balance of benefits (i.e., "good") over burdens ("evil").

Philosophers pursue sophisticated distinction among utilitarian approaches. Thus, under one view ("act" utilitarianism), the decision maker should focus only on the immediate situation and the immediate consequences to individuals affected by conduct. Another view, called "rule utilitarianism" takes a broader view of what is good in the long run and is especially concerned with the inherent negative effect of ignoring fundamentally just rules and laws to achieve a narrow purpose. Act utilitarians often justify conduct that rule utilitarians would not (e.g. lying under oath to secure the acquittal of an innocent person).

The major shortcoming of this balancing theory is the ease with which it can be manipulated by self-serving rationalizations to produce ***situational ethics*** and an "end justifies the means" credo which permits expediency to supersede principle. Moreover, many people use the ***process*** of utilitarianism without regard for the underlying philosophical commitment to ***unselfishness*** and ***benevolence***.

Many people claiming to be ethical consequentialists simply use the process to justify self serving conduct. They treat ethical and non ethical values on the same plane, often concluding that ethical values can be overweighed by non ethical ones and that self interests (including the needs and wants of family and friends) are inherently more important than the interests of others. This is not consistent with true philosophical utilitarianism but it seems be the dominant application of the theory.

Still another problem with applied utilitarianism results from the fact that it is often difficult to predict the consequences of conduct. Thus, many utilitarian decision makers justify conduct that will achieve short run gains even though they create the possibility of long run harms.

Golden Kantian Consequentialism (GKC). In developing a theory of ethics that avoids the shortcomings of each major theory and is still practical and easy to apply to decisions that have to be made in the trenches of competitive and stressful situations, we have amalgamated the best features of the other theories and added the "stakeholder" concept currently used in corporate responsibility discussions. For simplicity, and with a touch of whimsy, we call our new theory **Golden Kantian Consequentialism** or **GKC.** There are three main principles to GKC:

I. ***Individuals have moral obligations to advance and protect the well being of others.*** This is the underlying principle of the Golden Rule. It embodies both the affirmative and negative dimensions of the rule--help when you can, avoid harm when you can. Ethical persons treat others as they would like to be treated. To deal more effectively with the complexities of decisions which will affect different persons in different ways, we add consideration of the ***stakeholder concept*** which helps us to sort out the various interests involved. Under this concept, each person or group (sometimes referred to as a constituency) which is likely to be affected by a decision is said to be a "stakeholder" in the decision. Ethical decisions take into account the way the way all stakeholders are affected.

II. *Ethical values and principles ALWAYS take precedence over nonethical ones.*
Taking a page from Kantian duty theory, GKC asserts that ethical values are morally superior to nonethical ones and that when faced with a clear choice between such values, the ethical person should always choose to follow ethical principles. Thus, it would never be justified to violate any of the ten ethical principles for self interest.

III. *It is ethically proper to violate an ethical principle only when it is clearly necessary to do so in order to advance a more valid or important ethical principle under the circumstances.*
The consequentialist facet of GKC acknowledges the need to prioritize among competing ethical values in particular cases but only when it is clearly necessary to do so because the only viable options require the sacrifice one ethical value to advance another. In such cases, the ethical decision maker should act in a way that will create the most good and the least harm to the most people. Thus, the preservation of human life would be considered a higher order ethical value than honesty in some situations and an ethical person could lie to terrorists to save an innocent life.

Some ethical dilemmas are easier to resolve than others. The avoidance of immediate and serious unjustified harm to oneself or others is generally justified at the sacrifice of comparatively abstract principles such as honesty or promise-keeping. In the real world, however, we rarely face life or death situations. Most of our dilemmas pit honesty against fidelity, fairness against promise-keeping, or loyalty to one person or group against the commitments to another. In such cases, decision makers must be careful not to allow self interest to unduly affect the process, but must make their choices according to personal conscience.

Stakeholders in Public Professional Decisions. In the typical situation confronting a public sector professional, a decision affects a complex network of persons and groups including the persons directly helped or harmed, those indirectly helped or harmed, the decision maker him/herself, the persons the decision maker works for and with, the government entity represented and the government as a whole.

SPECIAL PROBLEMS IN RESOLVING ETHICAL DILEMMAS

Like traditional utilitarianism, the third step of GKC analysis is vulnerable to manipulation by those who know what they want to do and are willing to construct a rationale for doing it. In the next section, I discuss in more detail the excuses and rationalizations that tend to cause fundamentally decent people to act improperly but two special sources of dubious moral reasoning are worth pointing out in this context: (1) ***false necessity*** and (2) ***false ethical dilemmas.***

Necessity is not an established fact, but an interpretation.--Nietzsche

Necessity is the argument of tyrants, it is the creed of slaves.--William Pitt, The Younger

False Necessity. Necessity is one of the most powerful justifications available and one of the easiest to assert. In making consequentialist decisions, the necessity excuse can arise on two levels; (1) is the end or purpose of the conduct necessary or crucial (in which case, otherwise improper means could be justified), and (2) is it necessary to do certain things to accomplish that purpose?

On the first level, it is quite common for people who are task oriented to conclude without much critical analysis that a goal is "vital," "crucial," or "essential" or that the results of a failure to accomplish a goal will be "disastrous," "fatal" or "unacceptable." This reasoning often causes business executives to cut corners to avoid losses or protect their jobs, politicians to engage in questionable tactics to get elected or advance their social policies and journalists to use illegal or invasive methods of getting a story. What happens is that we often act on the implicit assumption that we have a right to win, to get or hold a particular job or promotion or to get what we want when, in the greater scheme of things, there is no social and often even no real personal necessity.

On the second level, we also find that many persons do not search diligently enough for alternative ways of achieving their goals. The fact is that deception, commitment breaking, concealing and covering up are frequently available shortcuts. It is also true, however, that there are usually completely proper means of accomplishing one's goals though they are often less convenient, more expensive or harder work. In many cases, thoroughly ethical ways of doing things require more work and some self sacrifice.

A large part of the problem results from an almost instinctive assumption that there is an inherent, ethically justifiable right to "win" (e.g., get or keep a job; get the money, prestige or power we want; obtain our client's goals; get a story or the scoop). There is no inherent right to win and ethical persons must face up to the fact that they are often at a disadvantage, at least in the short run, in competing with persons who are not constrained by ethical principles.

False Ethical Dilemmas. One has an ethical dilemma only when there are competing ethical values at stake in a decision. On the other hand, when an ethical values such as honesty or promise-keeping conflict with nonethical values such as personal wealth, prestige or comfort, it may take a strong person to sacrifice self interest for ethical principles but there is no ethical dilemma, the ethical course is to follow the moral principle. Thus, the moral response to a conflict in values is to choose ethics over expediency.

The problem with this analysis is that persons rarely see choices as being between ethical and nonethical values. Instead, they see ethical dilemmas arising from almost every clash caused by what they ***want*** (often construed as what they ***need***) and ethical principles that might cause them to deny their desires, especially if the ethical principle seems to require deprivation of money, power, or position. An automatic rationalization process often transforms fundamentally self interested nonethical motives into others-centered ethical ones, thereby creating a false ethical dilemma.

A DIGRESSION ON HUMAN NATURE: *Why Ethics is Easier Said Than Done.*

__Self Image as a Motivator__. Most people want to be ethical; they want to be worthy of the respect and admiration of others and they want to be proud of themselves and what they do for a living. Self-esteem and self-respect depend on the private assessment of our own character. Consequently, very few people believe they are not ethical regardless of what they do and what others think. In fact, most people believe that they are more ethical than others. Because of the importance of a positive ethical self-image, many people will alter their conduct if they discover it is inconsistent with their espoused values. Thus, it is important to be aware of the excuses, rationalization, and temptations which commonly impede ethical conduct.

__Excuses and Rationalizations__. Why do people act unethically? An easy answer is that they are just plain bad. This is simply not so. The truth is that a great deal of improper conduct is committed by fundamentally decent people who believe in and are committed to ethical values. There are three major reasons that ethically concerned persons fail to conform to their own moral principles: 1) ***moral blindness***
2) ***problems in moral reasoning***, and 3) ***selfishness.***

MORAL BLINDNESS. Moral blindness, the failure to perceive the ethical implications of conduct, is a major source of impropriety. In some cases, this blindness is a form of self deception, resulting from subconscious defense mechanisms which protect the psyche from having to cope with the fact that many of the things we do and want to do are rooted in pure self interest. An elaborate and internally persuasive system of excuses and rationalizations are used to fool our consciences.

A common excuse that transforms self interest into an ethical imperative is: *"I'm doing it for my family.* If I lose my job, or don't get this raise, or even jeopardize my chances for promotion, my family will suffer." This is an imposing rationale because it seems to invoke the ethical principles of loyalty, caring and accountability. Persons do have ethical obligations to their family. The problem with this justification is that in the vast majority of cases, it is simply an extended self interest rationale.

First, it is invoked in many situations where there is no evidence that the family benefits from or wants the person to sacrifice integrity and ethics for the contemplated gain (the bigger house, the BMW, the private school). Second, even if the family would vote to trade the breadwinner's honor for their comfort or convenience (beware of the excessive use of "need"), there is no moral justification for causing avoidable harm to others, and contributing to a less ethical society, in order to satisfy the self interest wants of one's family. This would be a kind of vicarious selfishness without moral grounding. Among other potent rationalizations:

--Everyone does it.
--To get along, go along.
--They don't understand.
--I can't do anyone any good if I lose my job.
--Ethics is a luxury I can't afford right now.
--It's not my job/worry/problem.
--If I don't get elected, I won't be able to do all the good things I want to do."

The fact that it is easy to deceive ourselves into believing our own rationalizations does not compensate for the inherent deficiencies of such reasoning.

Ethics in the Workplace. Moral blindness or ethical self-deception is particularly prevalent in excusing dubious occupational behavior. Most occupations develop the "insider syndrome" which provides a rationalization for facially improper conduct and allows persons within the occupation to fend off criticism from outsiders on the ground that the critics simply don't understand the necessities and values that insiders take for granted. A very common result of the insider perspective is a willful blindness to the ethical implications of job-related conduct. Thus, the business executive only asks, "Is this good business?," the politician, "Is this good politics?," and the journalist, "Is this good journalism?" as if those questions are divorced from fundamental ethical considerations.

Since ethics is so integral to trust, credibility and good will, the correct business, political or journalistic decision often takes into account and is consistent with the underlying values of ethical principles. It is not always so, however, and many short term solutions to professional problems involve dishonesty or deception, unfairness, commitment breaking and other ethical violations. Insider rationales tend to treat "getting a job done," as if it were an ethical principle itself. Moreover, this "principle" is deemed important enough to override true ethical values like integrity, honesty and accountability as if they were simply inconveniences. When the "just do it" credo of some occupations dominates decision making, the expediency ethic takes over and the "end justifies the means" rationale does its greatest harm.

The "It's Been Done Before" Excuse. It is important to ethical decision making that each decision be treated as a new situation requiring rigorous moral reasoning. Both in our private and professional lives, it is often easy to fall back on precedent to justify ethically questionable conduct. Thus, if you've lied to a person once, lying to him again is simply part of the original transgression. If printing the names of sex victims or accepting personal favors that create implicit conflicts of interest or, at least the appearance of impropriety, have occurred before, continuing the practice does not involve a new moral choice.

This reasoning is not justifiable from the perspective of ethics and, particularly, the principle of accountability. First of all, in almost all cases there are different considerations which could justify different decisions. Second, even if the circumstances are identical, the concept of precedent has no ethical significance.

All kinds of improprieties are tolerated at first and then become part of the customs and practices of an enterprise (e.g., racial or sexual discrimination, inside trading, taping conversations without permission, etc.). Regularity of conduct may alter ones expectations but it does not make something more ethically right. Each act of unfairness, lie, distortion, broken promise, invasion of privacy, etc., is an ***independent morally significant act*** which must stand on its own footing.

PROBLEMS IN MORAL REASONING. Many ethical problems are subtle and complex. They require thoughtful reflection and evaluation. In addition to sorting out the various values involved and the stakeholders affected, an ethical decision maker must engage in a substantial amount of factual analysis in order to predict the likely consequences of various options. This often requires sophisticated reasoning skills and defects in reasoning or mistakes in evaluation can result in decisions which are inconsistent with ethical principles. There are two common errors in moral reasoning: *1) Overestimating the costs/risks of doing* *the right thing*, and 2) *Underestimate the costs/risks of failing to do the right thing.*

Principled reasoning directs the decision maker to recognize where *information is incomplete, uncertain or ambiguous* and to make reasonable efforts to get additional information and clarify the ambiguities. After evaluating the facts, the next step is to predict, with as much certainty as is reasonably possible, the likely consequences of contemplated conduct on all those affected by a decision (i.e., stakeholders).

Another reasoning problem emanates from the fact that unethical conduct normally yields short run benefits which, when looked at through the distorted lens of self interest, seem to outweigh the *possibility* of long range harms which may flow from unethical conduct. Often, it is easier to lie, deceive, conceal or disregard commitments than to confront a problem head on and accept the costs inherent in honesty and integrity. Usually, resort to ethical shortcuts defers the problem to an indefinite time in the future. Pragmatists who are willing to act unethically if they can get away with it make several mistakes. One is the ease with which they conclude that the negative consequences of an improper decision can be avoided by keeping secrets and concealing information. Another, is the unjustified confidence that if the impropriety comes to light, the fallout can be avoided "when the time comes" by fancy footwork (e.g., "I'll think of something").

The fact is that an ethical person must often sacrifice short term benefits to achieve long term advantages. He or she must also be prepared to sacrifice physical or material gains for abstract intangibles like self-esteem, the respect of others, reputation and a clear conscience. An ethical person must be able to distinguish between short term and long term benefits and costs.

A proficiency necessary to ethical behavior involves practical problem solving--the ability to develop a minimum-risk strategy to implement an ethical decision. Some people do not follow through on ethical decisions because they believe that the consequences would be personally disastrous (e.g., they would severely damage their career or lose a job, an important customer or client). It is much more likely that persons will choose to act ethically if they know they can do so in a manner that eliminates or minimizes personally harmful results.

SELFISHNESS. Implicit in all ethical theories is the notion of caring for and respecting others. In many cases, this requires us to forego personal benefits or bear personal burdens; some level of self sacrifice is essential to consistent ethical conduct. Unfortunately, selfishness continually assaults the conscience with temptations and rationalizations. The natural inclination to selfishness has been amplified by self-actualizing philosophies coming out of the 60's and 70's which either advocated or were misinterpreted to condone selfishness. In the 80's, these philosophies seemed to spawn a "me" generation of greedheads whose dominant values stress materialism and personal gratification.

Although there are many who proudly proclaim their individualistic "everyone for himself" creed, most do not. Most still believe in the primacy of traditional values like integrity, loyalty, giving, and sharing, but they are influenced by their environment and the ample supply of excuses and justifications developed to defend the new faith. Selfishness comes in three major forms: 1) *self-indulgence*, 2) *self-protection*, and 3) *self righteousness.*

Self-Indulgence. Perhaps the most common and easily identifiable source of unethical conduct is self-indulgence. Although few people are as open as Ivan Boesky was when he publicly asserted that "greed is good," there is a blatant me-ism discernible in most professions which translates into behavior which often disregards the rights and interests of others and, at best, walks the line of propriety.

Self-Protection. The instinct for self-protection, the desire to avoid sanctions, penalties and even unpleasant or embarrassing confrontations, often generates unethical conduct such as lying, concealment, blameshifting and even document destruction. The temptation to sacrifice ethical principles is particularly great when it is believed that the consequences will be unfair or disproportionate--an easy thing to believe when you are the one to suffer the consequences. Thus, an employee who thinks he will be unjustly fired, a politician who believes he will be judged unfairly by the electorate often concludes it is *necessary* to lie, deceive or conceal. Many of the major scandals of recent decades were the product of self protective, unaccountable cover-ups.

Self-Righteousness. A particularly troublesome type of selfishness results arising from self-righteousness. At first blush, self righteously motivated conduct appears to be noble and selfless. There is, however, an implicit arrogance borne out of a sense of moral superiority that ignores and deprecates the ethically justifiable opinions of others. Self righteousness affects all of us from time to time. When we feel so certain we are right it is difficult to acknowledge situations where equally ethical persons can genuinely differ. It is often hard to walk the line between ethical relativism which gives undue honor to views which are clearly inconsistent with ethical values and dogmatic self righteousness.

A form of self righteousness is a virtual occupational hazard for politicians and others in the public sector who enter fields not known for material rewards. When we "give up" the pursuit of maximum earnings based on notions of public service and idealism, it is relatively easy to feel morally safe, if not superior. It is as if the mere fact that we are engaged in a socially worthwhile enterprise entitles us to the mantle of ethical propriety and freedom from criticism about the way we go about pursuing our noble goals.

In many cases, we develop a false sense of moral well being because we judge ourselves only in terms of our behavior in a single spectrum of activity. Thus, if we are incorruptible--we can not be bought at any price, or if we are scrupulous about keeping our commitments, or if we never knowingly act unfairly, it is easy to overlook what we believe are comparatively minor ethical transgressions such as deception, blameshifting, or other moral shortfalls. We are then surprised (and often outraged) when others criticize our ethics or impugn our integrity. It is hard to remember that being ethical in certain areas does not provide a justification for being less ethical in others.

PRINCIPLED REASONING--5 Steps

1. **Clarify**. Determine precisely what must be decided. Formulate and devise the full range of alternatives (i.e., things you could do). Eliminate patently impractical, illegal and improper alternatives. Force yourself to develop at least three ethically justifiable options. Examine each option to determine which ethical principles and values are involved.

2. **Evaluate.** If any of the options require the sacrifice of any ethical principle, evaluate the facts and assumptions carefully. Distinguish solid facts from beliefs, desires, theories, suppositions, unsupported conclusions, and opinions which might generate self interest motivated rationalizations. Take into account the credibility of the sources of information and the fact that self-interest, bias, and ideological commitments tend to obscure objectivity and affect perceptions as to what is true. As to each alternative, carefully consider the benefits, burdens and risks to each Stakeholder.

3. **Decide**. After evaluating the information available, make a judgment about what is or is not true, and as to what consequences are sufficiently most likely to be considered. If there is no way out of the dilemma, evaluate the ethical implications of the viable alternatives according to personal conscience in order to prioritize the values so that you can choose which values to advance and which to subordinate and, if necessary, whom to help and whom to harm. Consider the ***worst case scenario***--what is the worst thing that can happen--and ways in which ethically questionable conduct can be avoided by modifying goals or methods or consulting with affected persons to get their input or consent. In making the final decision resort to three *"ethics warning systems"*: 1) *Golden Rule*--are you treating others as you would want to behave; 2) *Publicity*--would you be comfortable if your reasoning and decision were to be publicized (i.e., how would it look on the front page of tomorrow's papers?); 3) *Kid on Your Shoulder*--would you be comfortable if your child(ren) were observing you; are you setting the example you preach?

4. **Implement.** Once a decision is made on *what* to do, develop a plan of *how* to implement the decision in a way that maximizes the benefits and minimizes the costs and risks. Remember, that any decision or act, no matter how intrinsically ethical, that is accompanied by a sanctimonious, pious, judgmental or self-righteous attitude is bound to be less effective. In some cases, it is outright counter-productive.

5. **Monitor and Modify**. An ethical decision maker should monitor the effects of decisions and be prepared and willing to revise a plan or take a different course of action based on new information. Since most decisions are based on imperfect information and "best efforts" predictions, it is inevitable that some will be wrong (i.e., either they will fail to produce the consequences anticipated or they will produce unintended and/or unforeseen consequences).

SUMMARY OF MAIN POINTS

I. ELEMENTS OF A GOOD GOVERNMENT ETHICS TRAINING PROGRAM

Goals: 1) **Affect decisions and behavior** of government workers so as to decrease wrongdoing and questionable conduct and increase rightdoing. 2) **Create a positive ethical environment** which fosters pride in public service and an abiding commitment to earning and maintaining public trust and confidence.

Strategies:

1. **Increase Ethical Consciousness**--develop and enhance individual sensitivity to ethical obligations and opportunities arising from the specific responsibilities and duties of persons in government, including the ability to perceive the ethical implications of conduct.

2. **Increase Ethical Commitment**--develop and enhance the desire to act properly and to safeguard the public trust by willingly avoiding even the appearance of impropriety.

3. **Increase Ethical Competencies**--develop and enhance proficiencies of reasoning and problem solving essential to ethical conduct.

Methods:

1. **Inspiration**--stimulate and excite the conscience by stressing the nature and importance of self esteem, a purposeful life and individual moral potential and accountability.

2. **Collaboration**--*unify* individuals within each government entity by invoking common interests in ethical behavior; *identify* from within the organization a comprehensive list of the practical pressures and factors which create ethical problems; *clarify* the entity's goals and purposes with respect to the problem areas identified; and *specify* minimal standards of behavior for common situations, guidelines for analysis and decision making in matters not specified, and clear statements of the ethical values and principles underlying the standards and guidelines.

3. **Education**--serious (but not sanctimonious) orientation and reinforcement programs designed to produce: *knowledge* of applicable laws and internal rules and policies; *understanding* of the underlying values and ethical principles; the ability to *apply* rules, standards, guidelines, and values to specific decision making situations and *positive ethical attitudes* including a sense of personal accountability and individual moral autonomy.

4. **Integration**--creation of an ethical culture by the incorporation of creative devices to reinforce positive ethical behavior and discourage improper conduct by: including issues of ethical sensitivity and performance in the recruiting, hiring, and promotion decisions; developing means of acknowledging and rewarding ethical conduct and sanctioning unethical conduct in a manner likely to affect decision making; establishing methods of communication and discussion of ethical problems and strategies for dealing with them.

STATEMENT OF MARSHALL J. BREGER

My name is Marshall J. Breger and I serve as Chairman of the Administrative Conference of the United States. Accompanying me is Jeffrey S. Lubbers, Research Director. I am pleased to be with you to discuss issues related to ethics in government and the reauthorization of the Office of Government Ethics.

These hearings could not be more timely. The Ethics in Government Act has been on the books for nearly ten years. It is time now to pause and take stock--to assess whether the Act strikes the optimum balance between the costs and benefits of federal conflict-of-interest regulation. It may be that the Act can be changed in ways that decrease the costs and increase the benefits to society.

The importance of the operation of the ethics laws has been clear to us at the Administrative Conference for some time. Therefore, last year I established a special Conference committee on ethics in government to begin to assess the need for reform of the Ethics in Government Act and related federal conflict-of-interest laws. Fred F. Fielding, who is a member of the Administrative Conference, agreed to serve as committee chairman, and I appointed as members Philip C. Bobbitt, Professor of Law at the University of Texas; Lloyd N. Cutler of the law firm of Wilmer, Cutler & Pickering; Alan B. Morrison, Director of Public Citizen Litigation Group, and Phillip N. Truluck, Executive Vice President of the Heritage Foundation.

As an initial step, the Special Committee held a Working Conference on Ethics in Government on March 1, 1988 which was attended by approximately 40 ethics-in-government experts and leaders. The participants were high-level government officials, including several current and former Members of Congress, White House counsels, heads of the presidential personnel office and the Office of Government Ethics, ethics experts as well as representatives of the private bar and public interest groups.

The purpose of this "roundtable" discussion was not to reach agreement on specific changes to the law, but rather to explore the dimensions of current issues related to the operation of the ethics laws. The discussion was intense and the viewpoints diverse. Although we did not reach a consensus on solutions to problems in this area, there was substantial agreement on the issues that most deserve study and action. We will be making the transcript of the conference available to the public.

The Conference's Special Committee will meet on a regular basis over the next several months to develop recommendations on a number of aspects of conflict-of-interest regulation that were discussed at the March 1 conference. In the short run, the Committee will produce recommendations related to the upcoming transition, and by the fall of this year we will complete a general review of the Ethics in Government Act. I will return to the Committee's agenda later, but first I want to address federal conflict-of-interest regulation more generally.

Discussion of Issues

I must state at the outset that the following views do not necessarily represent those of the Administrative Conference as a whole. Rather, they are my tentative views based upon personal study and extensive discussions of the issues in recent months with knowledgeable people of diverse backgrounds.

A. Historical Perspective. Analysis of problems with current conflict-of-interest regulation is aided by an understanding of the historical evolution of the ethics laws and the premises that underly them. The overall direction of this evolution has been from a system of criminal sanctions for wrongdoing to an administrative system of prevention and regulation. Although the process is continuing, I want to review the key events in this evolution thus far.

Although laws governing conflicts of interest can be found since the earliest days of the Republic, conflict-of-interest regulation in this country was still embryonic in the middle of the 19th century. After the Mexican War, for example, it was not uncommon for a sitting United States Senator to purchase an interest in, or assist in prosecuting, a war claim made by a private citizen against the United States. That same Senator would participate in the process of appropriating funds to pay such claims. Although the conflict of interest is obvious to us today, at the time it was no doubt viewed as an expedient way to supplement one's congressional salary. A statute was passed in the 1850s to halt this practice.[1] Following the Civil War other criminal conflict-of-interest statutes were passed, mainly to address wartime procurement abuses.[2]

The purpose of these early statutes was quite simply to protect the federal treasury. Conflict-of-interest regulation became more complex, however, with the creation of a civil service in the late 19th century and expansion of the role of government after World Wars I and II. Related to the growth of government was the increased technological complexity of modern society and the impact of this phenomenon on the make-up of the government workforce. The skills and knowledge required of government officials increasingly were those of the engineer, scientist, lawyer and economist. These developments gave rise to issues which are with us today, such as use of inside information by government employees and the perennial "revolving door" problem.

I think it important here to note that our difficulty with conflict-of-interest regulation is a direct result of the American system of government and the value we place upon the flow of ideas and people between the public and private sectors. A recent National Academy of Public Administration report begins with the observation that "[n]o other nation relies so heavily on noncareer personnel for the management of its government. In its breadth and importance, the in-and-outer system of leadership selection is uniquely American."[3] As you certainly appreciate, the tradition of Cincinnatus--of citizen leaders willing to leave their private pursuits to serve the nation--is harder to maintain today, but it is nonetheless an important feature of American government and one worth preserving. So unless we are willing to trade our system for a government entirely staffed by a completely separate civil service, as in Great Britain and elsewhere, then we have to be willing to bear the cost of conflict-of-interest regulation.

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[1] 10 Stat. 170 (1853)("Act to prevent frauds upon the Treasury of the United States.").

[2] *See* R. Roberts, *Conflict-of-Interest Regulation and the Federal Service: The Legacy of Civil Service Reform*, CENTENARY ISSUES OF THE PENDLETON ACT: THE PROBLEMATIC LEGACY OF CIVIL SERVICE REFORM 111-114 (Marcel Deckker, Inc. 1982).

The need for a comprehensive system of conflict-of-interest regulation in this country became clear by the end of the 1950s. Public confidence in the integrity of government was shaken by scandals in the Truman and Eisenhower Administrations, leading President Kennedy to place a high priority on reform of the federal conflict-of-interest laws. Even before taking office, Kennedy sought the assistance of Professor Abram Chayes of Harvard Law School and other experts in developing a plan to reform the conflict-of-interest laws. The Chayes group made a number of recommendations, including a procedure for conflict-of-interest review of presidential appointees in the new administration.[4]

A system of administrative regulation of conflicts of interest in the executive branch was suggested to Congress when the criminal conflict-of-interest statutes were consolidated and revised in 1962. Congress, however, resisted this approach. President Kennedy pressed ahead with an executive branch ethics program to supplement the criminal laws. The impetus for this effort was recognition that conflict-of-interest regulation was needed to prevent conduct that could adversely affect public confidence in the integrity of government. Punishment for actual wrongdoing was no longer enough.

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[3] National Academy of Public Administration, *Leadership in Jeopardy: The Fraying of the Presidential Appointments System*, FINAL REPORT OF THE PRESIDENTIAL APPOINTEE PROJECT 3 (Nov. 1985).

[4] Letter from Abram Chayes to Senator John Kennedy, Dec. 23, 1960, Official File, John F. Kennedy Library *quoted in* R. Roberts, CONFLICT OF INTEREST REGULATION IN THE FEDERAL SERVICE: A STUDY IN LAW, PUBLIC POLICY AND ADMINISTRATION 348 (unpublished Ph.D. dissertation, Syracuse Univ., Mar. 1982). Roswell Perkins, who chaired the New York City Bar Association study of federal conflict-of-interest laws, recommended that the review be done by a White House special assistant, while Professor Chayes supported creation of an advisory panel of luminaries outside the White House to conduct conflict-of-interest review of appointees.

President Johnson carried on the Kennedy initiative by issuing Executive Order 11,222 on May 8, 1965, establishing an executive branch ethics program. This order directed all agencies to adopt ethics regulations and required periodic non-public reporting of financial interests by high-level officials and, pursuant to Civil Service Commission regulation, by other employees required to report because of the nature of their employment. The financial disclosure statements were to be held in confidence unless the employee's agency or the Civil Service Commission found "good cause" for public disclosure.

I now come to the last major event in the evolution of the federal ethics laws: enactment of the Ethics in Government Act of 1978. The Act was passed in the post-Watergate period following a series of General Accounting Office reports that revealed inadequacies in the implementation of Executive Order 11,222.

The Ethics in Government Act made two major changes to federal conflict-of-interest regulation.[5] First, it replaced the confidential financial reporting system overseen by the Civil Service Commission with public financial reporting for top-level government officials and employees throughout the government. Second, it required the appointment of senior ethics officials in each agency--the designated agency ethics officials (DAEOs)--and established an Office of Government Ethics to oversee compliance with the financial reporting requirements and other ethics laws.

This history helps to put our current problems in perspective. Conflict-of-interest regulation has been evolving through periodic reaction to specific episodes of conduct. The evolution has not occurred in an even and consistent manner, but there has developed of an increasingly comprehensive system of regulation.

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[5] Except for amendments to Section 207 of Title 18 of the United States Code, the Ethics in Government Act did not affect the substance of the ethics laws. The applicable standards of conduct remain in the organic statutes of particular agencies, the criminal code, and the applicable presidential executive order.

The creation of the Office of Government Ethics is a landmark development for those who believe, as I do, that we need to rely in the first instance on an administrative system of conflict-of-interest regulation. We can argue about what its powers ought to be, but the Office of Government Ethics is unquestionably needed. One vital function that it performs is the review of the financial disclosure reports of presidential appointees who are subject to Senate confirmation. Need I say more about the importance of reauthorizing the Office this year?

B. Current State of Affairs. I think a critical question before us now is how far we are going to take conflict-of-interest regulation. In fact, the term "conflict-of-interest regulation," which I have been using, is a bit misleading. We have long passed the point of laws aimed solely at punishing wrongdoing or even at the resolution of actual conflicts of interest. We now are talking about a system of regulation to prevent the appearance of wrongdoing or unfairness in the decision-making process. This objective is legitimate. A democratic government depends upon the cooperation and support of the public. At the same time, it is vital that we tailor our conflict-of-interest laws as much as possible to avoid imposing unnecessary costs upon public servants, a point I return to later.

I believe that the federal conflict-of-interest laws can be revised both to increase their effectiveness and decrease their costs. While the Ethics in Government Act of 1978 made important advances in federal conflict-of-interest regulation, I think it is widely recognized that we do not yet have a coherent regulatory system--one characterized by clear standards of conduct and penalties appropriate to all branches of government and to the various levels of service.

One area deserving of review is sanctions available for violation of conflict-of-interest laws. For example, the Ethics in Government Act currently contains criminal sanctions (fines or imprisonment) for violation of post-employment conduct restrictions as well as a debarment provision. However, it does not authorize civil remedies such as restitution or civil penalties which may well be more appropriate in some situations. A report prepared for the Conference's March 1 ethics-in-government conference concludes:

> While some violations of this statute [18 U.S.C. § 207] are addressed appropriately within the current criminal framework, there is a class of violations of the statute which may not be sufficiently egregious to warrant use of the criminal process. In such cases, Justice Department prosecutors--wary of the difficulty of winning convictions before skeptical juries--understandably are very reluctant to institute criminal proceedings.[6]

It is well known to lawyers that juries may resist finding defendants guilty of offenses that carry disproportionately severe criminal penalties. Therefore, by providing a range of penalties, it is possible that more enforcement actions would be brought for violation of the Act's post-employment conduct restrictions. This led the Administrative Conference in 1979 to adopt a formal recommendation urging that administrative remedies be the primary enforcement tool for violations of 18 U.S.C. § 207, with criminal penalties reserved for clear-cut and egregious violations.[7] The recommendation was based on a study of post-employment restrictions done for the Conference by Professor Thomas Morgan.[8]

I also suspect that a systematic review of the standards of conduct and their associated penalties would reveal other instances of a mismatch between the standards of conduct and the penalties available for violations.

The Act's post-employment conduct provisions further illustrate my point about the lack of coherency of the current system. Under current law a former high-level executive branch official can be criminally convicted of violating the Act's restrictions, but the same conduct by a former high-level legislative branch official would violate no law.

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[6] Issues and Options Paper No. 4A Prepared for the Working Conference on Ethics in Government, Administrative Conference of the United States, Mar. 1, 1988 at page 42.

[7] ACUS Recommendation 79-7, *Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency*, 1 CFR § 305.79-7 (1987).

[8] Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L. J. 1 (1980).

Another area that deserves attention is the burden which some of the Act's requirements impose on government officials and, indirectly, on society as a whole. As I am sure you know, there is strong evidence of a crisis in the public service. This issue recently has been brought home by National Commission on the Public Service Chairman Paul A. Volcker, but the facts have been accumulating for some time. Work done by the National Academy of Public Administration, the Center for Business and Government at Harvard University's John F. Kennedy School of Government, the American Enterprise Institute and the Brookings Institution document an alarming trend. Put simply, it is becoming harder and harder to recruit and retain talented people to work in the government.

There are multiple reasons for the current crisis in the public service. Some undoubtedly are sociological and financial in nature. However, others relate to the constraints placed on officials by laws of various sorts, including the Ethics in Government Act and various openness laws that create the "fish bowl" aspect of government service. The former project director for the National Academy of Public Administration's Presidential Appointee Project concludes:

> There can be no doubt, in logic or in fact, that the Ethics in Government Act has impeded the recruitment of presidential appointees, has added a new disincentive to public service. Certainly there is nothing about the requirements imposed by the act that would make public service more desirable. It invades privacy, it restricts income and investment flexibility, and it constrains employment options after government service is concluded. None of those are attractions to public service.[9]

These are the costs, but what are the benefits of the Ethics in Government Act's requirements? Of course, this is a central question before the Administrative Conference's committee. I can tell you, however, that many knowledgeable people believe that the Act can be improved in ways that reduce the burden on the government official or employee without reducing the effectiveness of the Act.

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[9] Issues and Options Paper No. 1 Prepared for the Working Conference on Ethics in Government, Administrative Conference of the United States, Mar. 1, 1988 at page 10.

One area sorely in need of review by this Subcommittee, and one that the Conference will address, is the current financial reporting requirements. I have heard the argument that we should live with the current, six-level category-of-value approach because it is less demanding than a "net worth" approach. This, it seems to me, is the wrong way to begin the inquiry. The proper way, in my view, is to ask how the current approach serves conflict-of-interest analysis and whether a simpler approach (*e.g.*, broader categories) might be as or more effective and less burdensome. It is relevant to note the National Academy of Public Administration's survey of presidential appointees, in which 70% of the respondents reported some difficulty in completing the financial reporting form.[10]

The financial reporting burden often is compounded for presidential appointees requiring Senate confirmation. Many of the Senate committee financial disclosure forms predate the Ethics in Government Act and, therefore, naturally differ from Standard Form 278 used in the executive branch and from each other. There will be instances where the Senate committee will need information from the nominee that is not contained in the executive branch form. However, the burden on the nominee and the process as a whole would be lessened if the forms were in the main uniform, with perhaps a supplemental Senate form for that additional information. This would not require legislation. It would require different committee chairmen meeting together with White House counsel. We urge this be done before next year when a large number of nominations will be made.

Future Conference Activities

The work of the Administrative Conference over the next year or so will proceed on two tracks. On the short-term track are issues related to the upcoming presidential transition because any transition-related actions must be taken before the election. On a somewhat longer track is our general review of the Ethics in Government Act.

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[10] FINAL REPORT OF THE PRESIDENTIAL APPOINTEE PROJECT, supra note 1 at 13-14.

The Conference's Special Committee on Ethics in Government will meet on April 26 to follow up on suggestions that the Conference provide assistance during the next presidential transition. The participants in the March 1 conference generally agreed that the incoming administration could use assistance in dealing with ethics issues, and the participants believed that the Administrative Conference, as a non-partisan agency charged with improving administrative procedure, is ideally situated to fulfill this role.

Obviously, ethics issues must be on the agenda of any new administration, both for the transition itself and afterwards. Of initial concern will be the conflict-of-interest rules that should apply to members of the quasi-public transition team. How does one balance the need for such rules with the exigent and fluid nature of the transition? A study of this issue will be our most immediate priority.

Our committee also will examine the Ethics in Government Act to determine whether it erects unnecessary barriers to the recruitment of personnel. In this category are the Act's procedures for avoiding or curing conflicts of interest. The Act, for example, now allows use of qualified blind trusts to avoid potential conflicts, but this option is of little help to someone of modest resources because the administrative costs associated with blind trusts can be high. Therefore, one subject the Conference's committee will consider is whether newly-appointed government officials should be permitted to reinvest assets in diversified investment funds to avoid potential conflicts of interest.

Of course, even if the diversified investment fund option were available, the assets an appointee is required to reinivest would be taxed upon their sale. Treating the required divestiture of assests to accept a federal appointment as a "taxable event" can deter people from accepting appointments. Therefore, the Conference's committee will be exploring this issue to see whether, subject to appropriate limitations, some way can be found to remove this barrier to public service.

These are the kinds of issues we will be looking at in the next couple of months.

Over the summer, the committee will systematically review the Ethics in Government Act and come up with concrete proposals for improvement. Issues that will be included in this review are the financial reporting requirements I mentioned earlier, the role and powers of the Office of Government Ethics, the ethics laws as applied to federal advisory committees, and post-employment conduct restrictions.

I conclude my testimony by urging you, in considering specific proposed changes to the law, to keep in mind the overall system of conflict-of-interest regulation and its underlying purposes. All too often this area has been subject to piecemeal change, made in reaction to distasteful current events. What now is needed is comprehensive refinement of the current system following careful study and thoughtful analysis.

I thank you for the opportunity to appear today and bring the work of the Administrative Conference to your attention. The issues you raise are of utmost importance to the nation, and I wholeheartedly support the effort of the Subcommittee to address them.

OBSERVATIONS ON PUBLIC SERVICE AND PUBLIC SERVICE ETHICS IN THE FEDERAL GOVERNMENT

James D. Carroll
The Brookings Institution

and

Robert N. Roberts
James Madiscn University

The views expressed are individual ones and not those of the Institutions with which the individuals are affiliated.

Mr. Chairman and Members of the Subcommittee:

Ten years after the passage of the Ethics in Government Act the nation is facing another test of its ability and resolve to maintain public trust in the integrity of government institutions and government decision makers. The Ethics Act did make substantial changes in the operation of the federal government's public integrity program, but it did not fundamentally alter the policy of delegating to agencies and departments the day-to-day responsibility for integrity education, investigation and discipline. Nor did it fundamentally alter standards of conduct requirements.

- To improve the overall coordination of the decentralized program, the Ethics Act created the office of Government Ethics.

- The law gave the Director of the Office the apparent power to order corrective action by agencies and government officials.

- To assure impartial investigations and, if necessary, prosecutions of high-level officials for violations of criminal law, the Act provided for judicial appointment of special prosecutors after a threshold determination by the Justice Department of the possibility of criminal wrongdoing.

- To make it easier to identify potential conflicts of interest and to help to rebuild public confidence, the Act mandated comprehensive public financial disclosure for high-level officials in all three branches of government.

In contrast to the number of reforms directed at improving education, detection and enforcement, the Act left substantially intact the basic laws and regulations governing the conduct of present and former government employees and officials. Although scattered across the statute books, these laws generally apply to:

- Behavior before or upon entering government service, e.g., Title 18 U.S.C. 209, which requires the salary of government officials and employees to be paid only by the United States;
- Behavior while in service, e.g., 18 U.S.C. 219, which prohibits officers and employees from acting as agents of foreign principals; and
- Behavior after leaving service, e.g., 10 U.S.C. 2397, which requires that certain former DOD personnel who go to work for certain defense contractors file reports on their employment.

The Act did make a few modifications in standards of conduct. It restricted general lobbying by a former "senior" federal official by prohibiting the official from attempting to influence his or her agency on any matter of substantial interest to the agency for a period of one year after the official leaves government. It also prohibited any full-time government employee compensated at a rate equivalent to or excess of GS-16 from earning outside income in excess of fifteen percent of government salary.

Despite the few substantive changes made by the Ethics Act, the Act has come to symbolize concern over public service ethics. It has become the target of criticism as another example of "moral escalation" undertaken without adequate consideration of whether the reforms do more harm than good. Many people argue that the Act deters well-qualified people from entering public service. In our view, it is a mistake to view the Act itself as a deterrent. The underlying prohibitions may have a deterrent effect, but as we have emphasized most of these preceded the Act.

We believe a combination of factors has contributed to current concerns--both with ethics in government, and the capability of government to attract and retain well-qualified people--career as well as political appointees. The Act is not the problem, and minor modifications of the Act are not the solution.

THE PROBLEM

The problem has two parts. The first part consists of factors that characterize the federal government in the 1980s:

- A lack of leadership in public philosophy and in setting standards of conduct;

- Indifference to the sharing of power in the constitutional system, and to the "ethic of public service";
- Excessive lobbying and use of private money to gain access to and to influence policy making outside of formal channels;
- Different standards of conduct for members of Congress and the Executive Branch;
- Pursuit and use of public office for personal advancement; and
- Derogation of the career public service by presidents and others.

The second part of the problem consists of factors specific to the ethics and integrity program itself:

- Weaknesses inherent in the Office of Ethics, including the powers and organizational form of the Office;
- Lack of a career pattern for individuals who develop professional knowledge and skill in government integrity strategies, laws, regulations, and practices;
- Undue complexity in ethics laws and regulations;
- Undue inflexibility in laws and regulations; and
- Failure to emphasize and explain ethical principles as part of a positive approach to public service.

RECOMMENDATIONS

What should be done?

First, leaders in government and other organizations of American society should recognize and support the values of public service. A well-educated, committed, well-compensated public service is the best assurance of integrity in government and of self-government by the American people. As Paul Volcker told members of the Brookings Institution-American Enterprise project, A Public Service for the Year 2000 (1985-1986):

> For all the glories of Adam Smith, somebody has to set the rules and judicate disputes. Somebody has to defend the country and to explore space. Somebody has to keep the air clean and the environment safe for the next generation. Somebody has to respond to those more mundane, but nonetheless sometimes challenging, assignments of keeping government working effectively and efficiently, if self-government is to work at all.
>
> (James D. Carroll, ed., Documents from a Public Service for the Year 2000 Project, The Brookings Institution, January, 1987, sec. 3, p. 14.)

The Brookings Institution-American Enterprise Institution project demonstrated the corrosive effects of "bureaucracy bashing" by presidents and others. At present, a majority of members of the Senior Executive Service would not recommend careers in government to their children. Applications to the Presidential Management Internship program and other programs designed to bring well-qualified, trained young people into government have declined substantially in recent years.

While the pathologies of bureaucracy are real, the solution is not denunciation of public service. The solution is continuing effort to improve public policies, public service and the operations of government. The Volcker Commission on the Public Service, the Center for Excellence in Government, the National Academy of Public Administration, and others, are making such efforts. They deserve support.

Second, Congress should facilitate entrance by young people into public service by establishing a National Public Service Corps. Individuals accepted into the Corps would receive help in paying for graduate studies in public policy and management and career-long training, and would form the leadership of the next generation of public service. "In and outers" are valuable, but they do not provide the continuity, commitment and dedication government needs to manage its affairs with integrity and efficiency. Someone must mind the store.

Corporations today generously support graduate schools of management to train the next generation of corporate leaders. The federal government provides extensive support for research and education in the sciences. Who supports graduate education for public service? Almost no one. No wonder young people follow other career paths. The nation needs to invest now in developing the next generation of public service, through a Public Service Corps. Members of the Corps should be well-compensated, as well as assisted in their career development.

Third, Congress should enact new laws to disclose to public view the activities of lobbyists and use of private money to influence elections and policy processes outside formal channels. We agree with Hendrick Smith's observation:

> Certainly, there have been other periods of American History when graft and corruption were more rampant than today...But as Barry Goldwater asserted, the sheer volume of PAC money has made the appearance of venality seem pervasive. Without some reforms, many politicians and lobbyists are fearful that some scandal of blatant vote buying will bring a voter backlash and blow the lid off the PAC-man game and big bucks lobbying. For the most astute Washington players clearly fear that deep-pockets, me-first politics has gotten out of hand.
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> (The Powergame, New York: Random House, 1988, p. 271.)

What can Congress do? One action within the scope of integrity in government traditions is to require disclosure of ex parte contacts. Agency officials and lobbyists should be required to record and disclose contacts involving policy recommendations and official decisions. Such requirements apply in some regulatory agencies. The election finance laws suggest another analogy.

Fourth, Congress should abolish the Office of Ethics and establish an independent Government Integrity and Ethics Commission, similar to the independent commissions of several states. The Commission should have jurisdiction over laws, regulations, and practices affecting the integrity of government and public service--including responsibility for studying effects of the laws, educating and counseling people about the laws, monitoring compliance with the laws, recommending improvements in the laws, investigating complaints, and ordering corrective action when necessary. Special prosecutors should be retained for criminal investigations and prosecutions. The Commission should be bipartisan, composed of prominent citizens with experience in government and supported by a professional staff.

The Office of Ethics cannot do the job. It is part of the Office of Personnel Management, which itself is part of the Office of the President. By definition, presidents are partisan leaders. Experience indicates that criticisms of public officials--particularly presidential appointees--are often perceived in political terms. If allegations of criminal behavior are involved, attacks are perceived as an effort to criminalize partisan differences. Political motivations may inspire attacks, but whatever the motivation, the substantive question is the propriety and legality of the action complained of under government integrity laws and regulations. Separating political motives from substantive concerns is a task that should be entrusted to disinterested parties, as the experience with special prosecutors suggests. If the special prosecutor provisions are declared unconstitutional, an independent commission would become even more important. In any event, as noted below, it probably would be wise to substitute civil standards and sanctions for some of the criminal standards and sanctions in various existing laws. Disinterested citizens should oversee the review, interpretations, and administration of these laws.

Furthermore, the "corrective action" authority of the Office of Ethics is inadequate. The independent commission should be clearly empowered to take corrective action appropriate to the nature of the matter of concern--including issuing public reports that might exonerate as well as criticize, and enforcing orders in court. Between the extremes of quiet, informal counseling and referring matters for criminal investigation, the Commission should be empowered to exercise judgement--recognizing that avoiding breaking the law is not necessarily synonymous with ethical practice.

Fifth, Congress should create a career path for integrity-in-government professionals. These professionals should be full-time employees of the Government Integrity and Ethics Commission, assigned to agencies on a rotating basis.

Again and again, career and political appointees complain that ethics statutes and regulations are complex and difficult to understand. This is true, and the laws and regulations should be consolidated and simplified. At the same time, integrity-in-government matters are complex--and will grow more complex as the federal government's relationships with other national and international organizations grow more complex. "Third party government" and "government by proxy," as well as new forms of lobbying and campaign finance methods will increase conflict of interest and other questions. In most agencies today, these matters are assigned to employees with other responsibilities. There is little career incentive to develop expertise in these matters. With few exceptions--notably the work of the General Accounting Office--little analytical or empirical research on the operation and effects of the many ethics laws is being conducted. It is not surprising the uncertainty and confusion are common. Too often ethics laws are regarded as pestiferous nuisances--distractions from important work--rather than matters that go to the heart of confidence in government.

What should be done? We should create a cadre of professionals committed full time to working with ethics and integrity problems, and support research into these problems.

<ins>Sixth</ins>, the body of federal ethics statutes and regulations should be reorganized, consolidated, and simplified. As noted above, these apply to:

- Behavior before and upon entering government service;
- Behavior while in service; and
- Behavior after leaving service. The Administrative Conference has produced an excellent compilation of laws and regulations, a useful starting point for simplification and clarification. (See Administrative Conference of the United States, Working Conference on Ethics in Government, March 1, 1988, Issues and Options Papers, Statutes and Regulations, Appendix.)

The criminal standards and sanctions in many of these laws should be re-examined. Civil standards would be easier to administer, and more effective. The remedy should fit the nature and degree of the matter of concern.

Finally, we advocate development of a contractual approach to some ethics requirements. The Government Integrity and Ethics Commission (or OPM) should be authorized and directed to enter into individual contracts with senior officials. Each individual contract would resolve as explicitly as possible ambiguities and uncertainties present in individual cases as a result of the background and circumstances of a particular person, or uncertainties inherent in particular positions or work functions. The Commission should also be authorized to take hardship into account in negotiating individual contracts upon development of satisfactory evidence of hardship, and to alleviate extraordinary costs of assuming public office, e.g., a special allowance to relieve the burdens of onerous relocation or housing costs. The public is poorly served by inflexible requirements that make it impossible for qualified individuals to enter public service, or to take new positions in public service.

In summary, we believe that a thorough review of the substance, organization, and administration of policies and practices affecting public service is needed--including substantial changes in the approach to public service ethics.

STATEMENT OF

FRANK Q. NEBEKER
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
OF
THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON

THE REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

APRIL 13, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate your invitation to appear before this Subcommittee to present the views of the Office of Government Ethics (OGE) on the reauthorization of this Office beyond its present expiration date of September 30, 1988.

I want to express my support for legislation to extend the authorization of appropriations for the Office of Government Ethics for six years. We are asking for reauthorization for six years so that the expiration will fall in a year that is neither a Presidential election year nor the year following such an election. I suggest this because the staff is small in comparison to the transition duties. During the present reauthorization process, a significant portion of our resources must be diverted from our other responsibilities to prepare materials requested for the reauthorization decision. If that process continues into the Fall, we will be facing a transition year in which we must process hundreds of financial disclosure reports for Presidential nominees as well as the termination financial disclosure reports for those leaving at the end of an administration. The transition task must be done in major part over a very short period of time to enable nominees to assume their positions as soon after the President's inauguration in January 1989 as possible. The Office will once again have to forego many of its other responsibilities until we have completed that process. I plan to request temporary transfer of knowledgeable people from other agencies to keep the impact of transition to a minimum. If the reauthorization and transition processes can be separated, OGE will be able more effectively and consistently to perform the responsibilities Congress assigned to it.

In your letter requesting me to testify, you asked me to discuss the operation of the Office and any changes in the underlying statute that I would recommend. Much of what you have asked me to address was made a part of my letter to you of April 4, 1988, in which I responded to your questions regarding the programs and activities of this Office. While I will touch briefly on the contents of the letter's discussion of changes to the Act, I would like to provide the Subcommittee with a brief explanation of OGE's functions, followed by an overview of what the Office has accomplished since its first reauthorization in 1983.

Title IV of the Ethics in Government Act of 1978 (hereinafter the Act) established the Office of Government Ethics to provide overall direction of executive branch policies related to preventing conflicts of interest. The Act originally provided that the head of the Office, the Director, would be an advice and consent Presidential appointee serving at the pleasure of the President. As a result of the 1983 reauthorization hearings, the Act was amended to provide for a five-year term for the Director. My appointment in December, 1987 was the first made pursuant to that provision.

While OGE serves as the major policy maker, primary responsibility for administration of all "ethics in government" programs within an agency rests with the head of the agency. Each agency has a designated agency ethics official (DAEO). That officer or employee is designated by the head of the agency to administer within that agency the provisions of Title II of the Act (pertaining to the public financial disclosure requirements for the executive branch), to coordinate and manage the agency's ethics program, and to provide liaison with OGE with regard to all aspects of the agency's ethics program.

OGE establishes policy, coordinates agency training and counseling activities, monitors agency compliance with program requirements, and issues interpretive advisory opinions with respect to:

— executive branch personnel financial disclosure requirements;
— confidential financial disclosure requirements;
— "revolving door" or post-employment conflicts of interest;
— all other criminal conflict of interest restrictions found in 18 U.S.C. SS 202-209;
— executive branch employee responsibilities and standards of conduct.

The responsibilities within the Office are shared by the Chief Counsel and a staff of seven attorneys, and the Deputy Director, who, in addition to his major role, oversees the Monitoring and Compliance Division staff of nine management analysts. Including support staff, OGE is currently authorized 30 positions. At this time, the Office is operating with a staff of 27 persons.

The Act also established OGE's role in the Presidential appointment process. With respect to every Presidential nominee requiring Senate confirmation, the Director of OGE must transmit the nominee's public financial disclosure report to the Chairman of the Senate committee of confirmation. With the report, the Director must submit an opinion letter confirming the nominee's compliance with all applicable laws and regulations. The Senate committees generally regard receipt of OGE's opinion letter as a prerequisite to scheduling a confirmation hearing.

OGE's Legal staff assists in drafting regulations and establishing policies on various executive branch ethics matters. OGE's most recent regulatory activity involves the executive branch's confidential financial disclosure system. In response to concerns that the confidential financial disclosure system had been superseded by the public disclosure system of the Act, Congress amended § 207(a) of the Act in 1985 to give the President authority to require any officer or employee in the executive branch to submit a confidential financial disclosure report. Executive Order 11222 of May 8, 1965, as amended by Executive Order 12565 of September 25, 1986, provides for such a disclosure system. Section 1 of Executive Order 12565 gives OGE responsibility for administering the confidential reporting system. OGE has published proposed regulations establishing a system for agencies to follow and is in the process of completing the final regulations for publication.

Another responsibility of the Legal staff is to provide advice on executive branch ethics issues. This is done through written advisory opinions issued by the Director and informal advisory letters, as well as through more informal responses to telephone inquiries. Requests for advice come from agency ethics officials, employees, and private companies or firms or their counsel. To keep the agencies and the public informed concerning OGE's interpretations of the various ethics laws and regulations, OGE circulates a digest of its informal advisory letters to the agencies and other interested persons. The Office is in the process of preparing the full texts of the informal advisory letters for printing so that they will be available to the public through the Government Printing Office. In addition, the attorneys review the public financial disclosure reports of Presidential nominees prior to Senate consideration and draft the opinion letters accompanying the copies of the reports which are sent to the confirming committees. As necessary, the attorneys consult with the agency ethics officials or the appointees to bring the appointees and their reports into compliance with applicable federal conflict of interest laws and regulations. In this way, actual or potential conflicts of interest are identified and avoided through means ranging from divestment to recusal on specified issues.

As provided in Title IV of the Act, OGE's responsibilities include "monitoring and investigating compliance with the public financial disclosure requirements of Title II" of the Act and "monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch." To carry out these responsibilities, the management analysts in the Monitoring and Compliance Division conduct audits of the agencies' ethics programs, according to an annual program plan. The plan necessarily provides for a coverage of a few agencies in any one year. The statistics on the number of audit reports issued and the number of regional audits performed since OGE's first reauthorization in 1983 are as follows:

	Audit Reports Issued	Regional Audits
CY 1983	15	2
CY 1984	17	4
CY 1985	22	11
CY 1986	22	8
CY 1987	16	5

The Monitoring and Compliance staff also reviews the annual and termination public financial disclosure reports filed by Presidential appointees each year. The staff works closely with agency ethics officials to ensure that the reports are accurate and complete. The statistics on the number of public financial disclosure reports reviewed each year since the 1983 reauthorization are as follows:

Public Financial Disclosure Reports

	New	Annual	Termination	Total
CY 1983	242	727	94	1063
CY 1984	180	762	57	999
CY 1985	292	881	125	1298
CY 1986	305	756	101	1162
CY 1987	299	653	135	1087

Among the responsibilities of the Director of OGE enumerated in Title IV of the Act is that of providing information on, and promoting understanding of, ethical standards in executive branch agencies. OGE has employed a variety of methods for carrying out this function. The Office has established a system of training for ethics officials in the regional offices as well as in the Washington, D.C. headquarters offices of the agencies. From CY 1983 through CY 1987, OGE held over 90 one-day training courses for ethics officers in 14 cities, including the District of Columbia. In CY 1986 alone, OGE personnel conducted 92 separate training sessions at Executive Seminar Centers and various agencies, reaching over 3000 people, generally in management positions.

In 1983 and 1984, OGE held its fourth and fifth annual conferences. In 1985, the annual conference was replaced with a half-day seminar on the criminal conflict of interest statutes. A senior prosecutor from the Public Integrity Branch of the Criminal Division, Department of Justice, joined an OGE staff attorney in conducting the seminar in which they discussed the statutes from both the prosecutor's and the ethics counselor's viewpoints. Another seminar focusing on recurring problems with the public financial disclosure reports was held in 1986.

In May of 1984, OGE published its first issue of the Ethics Newsgram. Since then, OGE has published the Newsgram on a quarterly basis. It is designed to disseminate news and information about the executive branch's ethics program to the agencies' ethics officials.

In 1986, with the assistance of the President's Council on Integrity and Efficiency, OGE published "How to Keep Out of Trouble," a pamphlet which discusses the standards of conduct and conflict of interest statutes in layman's terms. Agencies may purchase the pamphlet from the Government Printing Office. Thousands of copies of the pamphlet have been distributed.

Another training device is OGE's 1987 videotape entitled "How to Complete the Executive Personnel Financial Disclosure Report." The tape features an enlargement of a completed SF 278 form with narration explaining each section. On January 31, 1988, OGE completed another videotape, entitled "Public Service, Public Trust." It reviews the conflict of interest laws and regulations applicable to executive branch employees through narrative and example.

From this discussion of the operations of OGE, I would like to turn to a brief discussion of my recommendations for changes in the Ethics in Government Act, which is one of the areas you asked me to address. In light of the upcoming transition, I believe a technical amendment to the Ethics in Government Act would be helpful in resolving an issue that arose during the Carter-Reagan transition, and which still has not been resolved. This is the question of the date on which a prospective nominee's SF 278 becomes available to the public once any copy of it has been given to OGE and the agency in which the individual would serve.

The statute requires OGE and the agency to make an SF 278 public within 15 days after its receipt. The present solution is that the White House provides draft SF 278's to this Office and the agency. During this early phase of the nominee clearance process, an actual determination to go forward with a nomination has not been made. Indeed, the President may make a determination not to proceed with a nomination. Exposing an individual to public scrutiny prior to the President's actual decision would interfere with the President's appointment procedures and could cause unnecessary embarrassment and hardship, particularly for a candidate who ends up not being nominated. Only after actual nomination does the White House release to this Office the original SF 278. Assuming the new administration will conduct its own initial conflict of interest review of potential nominees and continue to request the SF 278's directly from those individuals, we foresee the process for handling the nomination/confirmation SF 278's will remain much the same. Therefore, a clarification of the public availability of the draft SF 278 forms would be of assistance.

Mr. Chairman, I would like to say that the questions you posed in preparation for this hearing were most appropriate. They have illuminated a partial history of this ten-year-old Office, which reveals a growth process from a very tentative and probing beginning. With the concern for public confidence in government, the role of this Office is a vital one. Incidents of conflicts of interest, proven or only alleged, are isolated and infrequent among the thousands who dedicate themselves to public service. This Office serves those thousands, and the public needs to know that they can have confidence in them. This is our major role.

I appreciate this opportunity to speak with you today. I will be happy to answer or provide answers to any questions you may have.

United States General Accounting Office

GAO

Testimony

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Issues Related To The Office of Government Ethics

Statement of
Rosslyn S. Kleeman
Senior Associate Director
General Government Division

Before the
Subcommittee on Oversight of Government
Management
Committee on Governmental Affairs
United States Senate

ISSUES RELATED TO THE OFFICE OF GOVERNMENT ETHICS

Summary of Statement by
Rosslyn S. Kleeman
Senior Associate Director
General Government Division

Maintaining the highest ethical standards among elected officials and career civil servants is an important element of a vital public service. Toward that end, GAO identified areas requiring attention by the Office of Government Ethics (OGE) and possibly by Congress.

Most ethics laws now limit the penalties for conflicts of interest to criminal sanctions, notwithstanding the severity of the offense but the prevailing view among those administering the laws is that a range of penalties, including civil penalties, is more appropriate. We agree.

OGE needs to assess the adequacy of existing regulations and to issue regulations governing confidential financial reporting among federal employees at GS-15 and below.

Agency ethics officials say OGE has done a credible job in several areas, such as serving as an advisor and educator as well as helping to solve potential conflicts of interest and systemic problems in agency programs. OGE has not always been able to review, as quickly as required, individuals' financial disclosure forms and agencies' ethics programs. Also, OGE's training and consulting services are well received, in strong demand, but in short supply. OGE attributes these conditions largely to limited staff size--27 people in total.

The upcoming Presidential transition will likely strain even further OGE's ability to review disclosure forms, provide advice, and the like, while also continuing its regular oversight and advisory programs.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to participate in this hearing on the Office of Government Ethics' (OGE) reauthorization beyond September 30, 1988, and to highlight the results of our review of OGE's operations for this hearing.

My comments will focus on questions surrounding the appropriate role for OGE and whether OGE's current activities are consistent with those envisioned in the Ethics in Government Act of 1978. I will also discuss specific areas of concern we identified which were confirmed by designated agency ethics officials, past OGE directors, and others.

We interviewed designated agency ethics officials or their representatives in 14 agencies (a mix of cabinet level departments and smaller agencies), all 4 past directors of OGE, and current OGE officials. We analyzed the Ethics Act, its legislative history, and implementing regulations to identify areas possibly warranting the Subcommittee's attention in connection with the reauthorization.

We continue to believe the creation of OGE was an important achievement. It should be reauthorized. If Americans are to have confidence in the integrity of the federal government, the prevention of conflicts of interest among federal employees must be assured. OGE directs conflict of interest policies applicable to almost 3 million federal workers, and has made progress in providing the guidance, training, and oversight necessary to promote ethical conduct in the federal system. Its leadership is critical, especially in view of the need to reassure the American public that the conduct of elected and career public servants is being watched.

Nonetheless, several issues related to OGE and the government's ethics system in general need attention: (1) the adequacy of existing ethics regulations needs to be assessed, (2) OGE has not met its goal of reviewing agency ethics programs every 3 years, and (3) ethics training for high-level executive branch employees is also a concern. The agencies continued cooperation with OGE will help the Office carry out its oversight functions.

DEVELOPING RULES AND REGULATIONS

OGE has amended regulations on standards of conduct (5 CFR 735) issued by the former Civil Service Commission. It has also issued regulations relating to executive branch financial disclosure requirements (5 CFR 734), post employment conflict of interest (5 CFR 737), and its own operations (5 CFR 738).

Generally, the agency ethics officials in the 14 agencies we interviewed believe the ethics regulations are helpful but several also feel the regulations can be improved. They believe the regulations in general need to be clarified and should include more examples, and older regulations should be reviewed and updated. We agree.

Implementing regulations currently exist for only one conflict of interest statute (18 U.S.C. 207) which imposes certain restrictions on the activities of former federal employees. As we reported in June 1987, (Ethics Enforcement: Process by Which Conflict of Interest Allegations Are Investigated and Resolved, GAO/GGD-87-83BR), several agency officials, including two Inspectors General, said regulations are also needed for the conflict of interest statutes involving current employees, particularly 18 U.S.C. 208 which prohibits current employees from participating in matters in which they have a financial interest. They believe that regulatory definition of key terms would help in identifying prohibited conduct. Several of the agency ethics officials we interviewed also believe there should be regulations for all conflict of interest statutes (18 U.S.C. 202-209).

OGE believes the best way to define key terms used in the conflict of interest statutes is through amendments to the statutes. Further, OGE believes that until legislative changes are made to the conflict of interest statutes, they can best serve agency ethics officials by providing interpretative guidance such as advisory opinions, memoranda, and newsletters.

OGE began an evaluation of the standard of conduct regulations (5 CFR 735) in late 1986 because OGE believed the regulations needed improving, but the evaluation was discontinued in early 1987 because of OGE's higher priority needs. Given its limited staff, OGE may find it difficult to improve existing regulations, not to mention developing and issuing new ones.

EVALUATING ETHICS LAWS

Most agency ethics officials we interviewed said the conflict of interest laws should be revised to clarify imprecise language and provide definitions. For example, they specifically identified the term "particular matter" used in 18 U.S.C. 207 and 208 as needing clarification. Under 18 U.S.C. 207, a "particular matter involving a specific party or parties" with respect to which a former employee must avoid representational activity excludes policy determinations. However, a "particular matter" as used in 18 U.S.C. 208, which disqualifies employees from acting in matters affecting a personal financial interest, includes policy determinations.

OGE has not recommended amendments to the Attorney General to address the language of the conflict of interest laws. Rather, OGE believes that it has provided ethics officials and others appropriate guidance to deal with any ambiguities through its process of consulting and cooperating with Justice.

Also, most agency ethics officials we interviewed believe the conflict of interest laws should provide for civil penalties in addition to criminal penalties. Similarly, Department of Justice officials told us the conflict of interest statutes should be amended to augment existing felony penalties with lesser criminal and civil penalties. These officials described the difficulty of prosecuting conflict of interest cases as felonies, and both Justice and agency ethics officials have said additional penalties could facilitate enforcement of conflict of interest laws. OGE officials agreed. And we agree.

REVIEWING PUBLIC FINANCIAL DISCLOSURE REPORTS

OGE reviews certain public financial disclosure reports including those filed by all designated agency ethics officials and Senate-confirmed presidential appointees, high-level White House officials, and the President and Vice President. Other executives' reports are reviewed by ethics officials at the agencies or by the Secretaries concerned for members of the uniformed services.

As required by the Ethics Act, OGE must review financial disclosure reports within 60 days after they are transmitted to OGE. An OGE study completed last summer showed 9 out of every 10 reports were not approved within 60 days. OGE officials said this situation occurred because in the past its review staff was also responsible for examining agencies' ethics programs. In November 1987, OGE dedicated a group to perform reviews of agency ethics programs and another group to review financial disclosure reports. OGE has not had enough experience with this new arrangement for us to determine whether OGE's overall timeliness has improved.

OGE is charged with administering the confidential (non-public) financial disclosure system, which applies for the most part to employees at or below the GS-15 level in positions involving significant discretionary authority. Confidential reporting requirements were originally established by executive order in May 1965. In 1980, Justice decided the Ethics Act superseded the earlier executive order, thus removing the legal basis for requiring confidential financial disclosure reports. However, according to OGE, all agencies except the Justice Department, have continued to use the confidential reporting systems they had in place before Justice's decision.

On the basis of legislation enacted in December 1985, the President issued an executive order in September 1986 authorizing

OGE to develop regulations for a comprehensive system of confidential financial reporting for officers and employees of the executive branch. In December 1986, OGE proposed regulations to establish such a system. OGE is processing comments it received on the proposed regulations and as of April 1, 1988, has no estimate as to when the confidential financial disclosure regulations will be issued.

INTERPRETING RULES AND REGULATIONS

When requested, OGE consults with agency ethics counselors and other officials about conflict of interest problems. In this role, OGE provides extensive advisory services through meetings with agency representatives and a telephone consulting service. More than half of the agency ethics officials we interviewed said they consult OGE on ethics matters "often" or "very often". Almost all of those using the service said OGE's consultation was helpful. Former OGE directors said that OGE's consulting services are necessary and vital.

As required by the Ethics Act, OGE established a formal advisory opinion service. OGE also issues informal advisory opinions. Most of the ethics officials we interviewed said it would be helpful if OGE compiled, indexed, and sent all of its opinions to the agencies. OGE officials said they plan to have an indexed publication of opinions available in the next 2 to 3 months.

Through its decentralized training program, OGE trains agency ethics officials and assists them in developing ethics training programs for their agencies. According to OGE, it also provided about 50 1-day training sessions in regions over the last 4 calendar years, attended by an average of 50 ethics officials and career employees at each session. It also provided training at various agencies in Washington, D.C., and the Executive Seminar Centers at Oak Ridge, Tennessee, and Kings Point, New York. Attendance for 1986 and the first 7 months of 1987 totaled approximately 5,000 persons.

Both this Committee and the House Committee on the Judiciary, when considering the 1983 OGE reauthorization, noted a growing concern that high level officials were not familiar with the conflict of interest laws. OGE still sees the need for training of high-level officials to be a problem. OGE sends a letter to all new presidential appointees informing them of their responsibility to become familiar with ethics laws and regulations. OGE also participates in sessions at the Federal Executive Institute where they can reach some, but not necessarily all, high-level officials. OGE attempted to develop a training session to inform new presidential appointees of their ethics responsibilities. A former OGE director told us that the White House needs to stress the importance of ethics training by commanding the attendance of Deputy and Assistant Secretaries at such training.

OGE officials have seen an increasing demand for ethics training in the past 5 years. Almost one-third of the agency ethics officials with whom we spoke said OGE should provide more training. Also, the presidential transition can be expected to increase the demand for ethics training.

MONITORING COMPLIANCE

OGE reviews agencies' financial disclosure systems and other aspects of their ethics programs to identify programmatic deficiencies. It then works with the agencies to resolve problems.

OGE's reviews cover a wide range of ethics-related activities. To resolve any problems noted, OGE prefers to advise and assist the agencies and to avoid adversarial relationships. Most agency ethics officials said OGE reviews are useful, and an OGE official said the agencies are generally cooperative in complying with OGE recommendations.

OGE's reviews take from 2 to 4 weeks at an agency, and its goal is to review each agency's program once every 3 years. However, OGE has not achieved this goal. OGE has reviewed larger agencies' systems about once every 4 years and smaller agencies' systems about once every 5 years. An OGE official said the agency does not have enough staff to do the reviews more often. Two former OGE directors said that even triennial reviews are not frequent enough.

To strengthen its monitoring, OGE has, among other steps, asked agency ethics officials to inform OGE when they refer cases to the Justice Department. Also, OGE asked some Inspectors General to voluntarily report to OGE any investigations of employees at or above the GS-15 level resulting in referrals to Justice or in administrative action. OGE is developing a form which agencies will be required to file annually to report such information as the number of cases referred to and declined by Justice and the number and types of administrative actions taken by agencies.

The Ethics Act does not charge OGE with responsibility for enforcing the criminal conflict of interest laws or administering agencies' standards of conduct in individual cases. Responsibility for enforcement of the conflict of interest laws is vested in the Department of Justice, and each agency administers its own standards of conduct. When OGE becomes aware of a potential conflict of interest, it works with the individual to resolve the problem and believes that it can be most effective in a consulting role. OGE believes this consultative approach encourages individuals filing disclosure forms and ethics officials to come forward with their questions and concerns so they can be resolved before legal violations occur.

OGE does identify ethics problems in its reviews of individual financial disclosure reports and agencies' programs, and in other ways. When it does, the OGE Director can order corrective action, issue a public statement, refuse to sign an individual's financial disclosure statement, and/or refer the case to Justice.

Although the Ethics in Government Act gave OGE the authority to order corrective action, it does not define the corrective actions OGE may take. OGE considers corrective action to include measures such as requiring an official's recusal from a specific matter, divestiture of a financial interest, and establishment of a blind trust.

Although the Ethics Act empowers OGE to order an individual to take specific action to avoid a conflict of interest, OGE has no authority to enforce its orders. If an individual refuses to comply with an OGE order, OGE's recourse is to report the matter to the agency head, or other authority responsible for the individual's appointment, or to refer it to Justice.

The act requires OGE to refer to the Attorney General the name of any individual OGE believes has willfully falsified or failed to file required financial disclosure information. OGE has referred such cases to Justice.

OGE is not a law enforcement agency. Without fundamental changes in the Ethics Act and a larger and different type of OGE staff, it is probably not feasible for OGE to have an enforcement function. All former OGE Directors agreed that OGE should not perform an enforcement function. Justice officials also believe the agencies properly have first-line responsibility for enforcing conflict of interest laws and disciplining individual employees. They see OGE's role as one of facilitating an understanding among executive branch officials about what the laws require.

PLANNING FOR THE PRESIDENTIAL TRANSITION

Finally, it is clear from past experience that the upcoming presidential transition will place more demands on OGE's limited resources. OGE works closely with the White House consulting on nominees and potential nominees. OGE also anticipates the transition will increase the number of contacts from the agencies and from officials new to federal service.

OGE assigns a high priority to the review of nominees' financial disclosure reports. Because the time required for the reviews depends on the size and nature of the individuals' holdings, OGE cannot predict how much time will be required and how such reviews will impact its other work. In the last transition, OGE discontinued reviews of agency ethics programs for about 6 months because staff normally doing this work were assigned to review disclosure reports. OGE is exploring approaches to deal with the increased transition workload, including working with OPM to get 2 or 3 agency ethics personnel detailed to OGE.

CONCLUSION

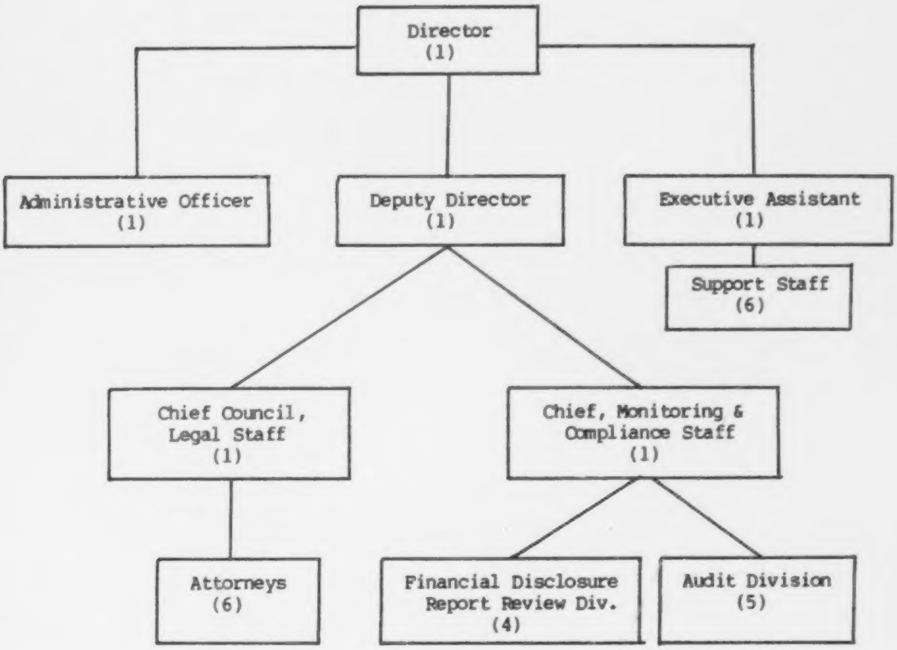
In summary, maintaining public confidence in the integrity of federal officials and employees is of critical importance. I would emphasize the importance of an ongoing program that focuses on preventing conflicts of interest on the part of federal employees through clearer standards, effective training, and strong enforcement. Generally, we and others we talked with believe OGE is doing a good job of carrying out its responsibilities in these areas, given its limited resources. OGE appears to have made an earnest attempt to address problems and issues in areas needing attention, as we have pointed out.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions you may have.

ATTACHMENT I

ATTACHMENT I

Organization Chart for the Office of Government Ethics (Number of Staff as of April 1, 1988)


Director
(1)
Administrative Officer
(1)
Deputy Director
(1)
Executive Assistant
(1)
Support Staff
(6)
Chief Council, Legal Staff
(1)
Chief, Monitoring & Compliance Staff
(1)
Attorneys
(6)
Financial Disclosure Report Review Div.
(4)
Audit Division
(5)

LAWS AND REGULATIONS REGARDING CONFLICT OF INTEREST

The Ethics in Government Act of 1978 was enacted as Public Law 95-521 on October 26, 1978. Titles I, II, and III established public financial disclosure requirements for officials in the legislative, executive, and judicial branches of the Government. Title IV established the Office of Government Ethics (OGE) to provide overall direction on policies concerned with preventing conflicts of interest by officers and employees of executive branch agencies. Title V amended the criminal conflict of interest statute (18 U.S.C. 207), which restricts certain postemployment activities of former officials and employees of the executive branch, independent agencies of the United States, and the District of Columbia. Title VI provided the authority and established procedures for appointing special prosecutors (now independent counsels) to investigate and prosecute certain executive branch officials (or officials of a national presidential campaign committee) who may have violated federal criminal law. Title VII established an Office of Senate Legal Counsel to represent the Senate, its committees and subcommittees and individual senators and staff in certain proceedings before the courts. It also conferred jurisdiction on the courts to enforce Senate issued subpoenas.

The Ethics Act has been amended five times as follows

-- Public Law 96-19 (June 13, 1979) amended certain financial disclosure provisions in the Act,

-- Public Law 96-28 (June 22, 1979) made substantial changes in the provisions of title V which restrict former government officials from representing others in certain matters before the agencies in which they served,

-- Public Law 97-409 (January 3, 1983) amended the independent counsel provisions of title VI and extended this title for 5 years,

-- Public Law 98-150 (November 11, 1983) extended the authorization of OGE until September 30, 1988, amended and clarified provisions concerning OGE's authority, and amended certain financial disclosure provisions, and

-- Public Law 99-190 (December 19, 1985) amended section 207 to give the President authority to create a new confidential financial disclosure system.

The criminal conflict of interest statutes contained in 18 U.S.C. 202 through 209 which are applicable to federal officials and employees are, in brief

-- 18 U.S.C. §202, which provides definitions;

-- 18 U.S.C. §203, which (otherwise than as provided by law for the proper discharge of official duties) prohibits the payments to or receipt of compensation for representational services rendered by officers, employees, members of Congress, and others in relation to contracts or other matters involving the government;

-- 18 U.S.C. §204, which prohibits members of Congress from practicing in certain federal courts;

-- 18 U.S.C. §205, which prohibits officers and employees from representing other parties in contracts or other matters involving the Government;

-- 18 U.S.C. §206, which exempts retired officers of the uniformed services and certain other persons from sections 203 and 205;

-- 18 U.S.C. §207, which restricts post-employment representational activities;

-- 18 U.S.C. §208, which prohibits officers and employees from participating in matters which affect a personal financial interest; and

-- 18 U.S.C. §209, which prohibits a government employee from receiving any supplementation of salary from an outside source.

In addition to these governmentwide statutes, there are statutes which establish specific requirements or responsibilities applicable to employees of particular agencies. Regulations and guidance which relate to the ethical conduct of federal employees include: Executive Order 11222 and its implementing regulations, contained in 5 C.F.R. Part 735, which prescribe standards of ethical conduct for employees of executive departments and independent agencies; Executive Order 12565 which gives OGE responsibility for developing regulations for a confidential financial disclosure system; opinions issued by OGE and the Justice Department; rules of the House and Senate governing conduct of Members; and the various codes of conduct in the judicial branch.

STATEMENT OF DAVID H. MARTIN
BEFORE THE SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT

Thank you for the opportunity to present this statement to you this morning, Mr. Chairman.

First, I would like to comment on the importance of the Office of Government Ethics in the general regulatory scheme in the executive branch for ethics standards and enforcement. The executive branch ethics system is a decentralized one in which each agency head is responsible for the agency ethics program and a designated agency administers that program. The ethics office oversees the executive branch ethics system by setting general standards, providing training, counseling and interpretive advice, and maintaining a focus on ethical problems and concerns. Secondly, the ethics office plays a major role in raising the general level of ethical awareness in the country, by educating executive branch officers and employees and the general public alike in the conflicts of interest laws and the standards of conduct. In all of these roles I believe the ethics office does an outstanding job with its limited staff.

Particularly distressing to me, both while I was Director and now, is what I call the politicization of the ethics process in the government in general. That is, the tendency of fellow legislators, or executive branch officials or employees to point fingers at others and prejudge conduct, claiming that one is unethical or has acted improperly when the facts are not fully known or when ethics is not really at issue. There is a general tendency to seize any opportunity to label the activity of a political adversary an ethical violation, even when ethics may not be involved. That has occurred repeatedly in the financial reporting area. Besides unfairly smearing character, this type of activity tends to undermine the effectiveness of the Office of Government Ethics, the positive influence that it provides, and the public's confidence in the integrity of its officials.

The Ethics in Government Act of 1978 was the first to require public financial disclosure. In the last ten years, many have questioned the wisdom of these provisions. I believe that financial disclosure works. Public financial disclosure has proven to be a valuable tool for individuals, filers and government officials alike in determining conflicts of interest by raising the ethical, moral and legal awareness of potential and apparent conflicts of interest which may arise in the course of public service. I strongly support financial reporting and know that this subcommittee agrees with my views in this arena. Having said that, it is my opinion that the present law requiring financial disclosure and the accompanying forms and instructions are too complicated and difficult. They are in serious need of simplification. My recommendations are simple: raise the threshold for reporting all assets and income to a uniform $1,000, and eliminate categories of reporting for assets, income and liabilities. The present public financial disclosure system requires so much detailed information that the review process is slow and careful reviews impractical. I believe that an informed determination of the existence of a financial conflict can be made from a simpler listing of assets, liabilities and other financial and professional relationships. If the determination of the existence of a conflict can not be fully made but questions are raised, the reviewing agency ethics official or the ethics office can inquire further, which is frequently the case. A more simplified filing procedure would simplify the review process, allowing more time and attention to those filers who have a conflicts problem. Secondly, too many people are required to report publicly. I do not believe that it serves public policy or practicality to have lower level employees report publicly. I would limit public reporting to presidential appointees requiring Senate confirmation, White House political appointees, certain Schedule C policymakers and career policymakers. I would eliminate public financial reporting for all other career employees. However, I would maintain confidential financial disclosure for all those who presently file.

I made agency education and training a high priority while I was Director of the Office of Government Ethics. This committee frequently was frustrated at many agencies due to a lack of commitment of agency manpower, the failure of training programs, and inadequate attention from agency heads and top management. There has to be some mechanism that will force agency administrators and heads to focus on their ethics programs. Some mandatory training for high-ranking officials may be necessary to do this, and I suggest to the committee that it consider some measure to authorize the Office of Government Ethics to initiate such a program. Perhaps a regular cabinet level briefing at the White House will bring the proper tone and focus into the agencies.

There should be a uniform rule for gift acceptance authority for all agencies or employees who are on official travel. At present, some agencies have it and others do not. Clearly, an individual should not be authorized to accept a gift or travel reimbursement directly; the rules for allowing an agency to accept it should carefully and clearly be set forth in regulations so that the donor of such a gift understands the rules as well as the agency.

Assuming that the post-employment laws are not changed by the present bills that are now in Congress, it is my recommendation that the senior employee designations be eliminated and that "senior employees" be established simply by an across-the-board salary designation.

Along the same lines, you should revisit the separate segregated component issue and determine whether or not that really makes any sense, not only in terms of the White House but in terms of other agencies. If you really believe that that law is designed to eliminate influence for one year, then it ought to be to the whole agency and not merely a separate component. A high ranking official's ability to influence cuts across lines of authority and separate offices within an agency. This occurs not only at the White House but in all agencies. Therefore, if you eliminate it for the White House, eliminate it for all agencies, and you would eliminate a lot of headaches and administrative and bureaucratic overhead.

In sum, the Office of Government Ethics operates quite efficiently with a small number of personnel. In my opinion, the office ought to be doubled in size and the desk system arrangement that was put in place during my administration ought to be continued so that agency officials know who within the Office of Government Ethics understands their particular agency problems. Finally, the Office of Government Ethics ought to be a separate and independent agency within the executive branch.

Thank you. I am prepared to answer any questions you may have regarding the ethics office.

35m.102.106.

KATHLEEN A. BUCK
GENERAL COUNSEL
DEPARTMENT OF DEFENSE

I appreciate the opportunity you have given me today to express the views of the Department of Defense (DoD) regarding the reauthorization of the Office of Government Ethics (OGE).

As the largest of the Executive Departments with three million civilian and military members, the Department of Defense has a continuing interest in the vigorous enforcement of Standards of Conduct. Our long experience in this area has produced detailed directives and aggressive education programs within the Department. While no program of enforcement and education can be expected to prevent every violation of statute or regulation, we are proud of our record. In achieving our present posture and looking toward future improvements, we have come to realize that, in large part, the Office of Government Ethics has provided us the guidance and assistance necessary to achieve our goals. In only eight years, OGE has become an essential element in the maintenance and strengthening of Standards of Conduct in the government.

I will address the issues you identified in your March 25, 1988 invitation letter. First, I will consider the relationship between the Office of Government Ethics and Designated Agency Ethics Officials (DEAOs). Naturally, DoD and OGE have not always found themselves in complete agreement, but we feel that OGE has established effective channels for meaningful dialogue and resolution of disagreements. Most important, our agencies share the common goal of maintaining the highest standards of conduct, and thus our differences have concerned only the means, not the ends. Our strong relationship with OGE results from the ready accessibility of OGE Chief Counsel Gary Davis and his staff to the lawyers in our Standards of Conduct Office and numerous other DoD legal offices. I have rarely found it necessary to become personally involved in discussing OGE opinions and decisions. This has been handled, as it should be, by direct contact between OGE and DoD staffs.

Second, we believe that OGE's statutory authority has proven adequate in practice. OGE has taken a vigorous approach to maintaining the overall direction of Executive Branch policies, developing consistent interpretations and seeking to prevent conflicts of interest. Each Executive Branch department is responsible for enforcement of its own Standards of Conduct regulations and OGE has properly fulfilled its charter by providing the guidance necessary to assist the departments in this effort. They have not been content simply to publish regulations and let them sit there. They have always made that important follow-up effort to keep us educated and to ensure that government ethics are viewed as important matters - not a group of amorphous regulations designed solely to hinder government operations.

Judge Frank Q. Nebeker brings to OGE not only an extensive background in government, but also a firm commitment to professional education. We expect that his dedication and leadership will enhance OGE's efforts to insure that adherence to Standards of Conduct continues to be an integral part of government operations.

Third, you asked if Designated Agency Ethics Officials were sufficiently protected from political interference. I am not aware of any problem of that nature within the Department of Defense. Secretary of Defense Weinberger staunchly supported the decisions of Agency Ethics Officials, a tradition followed by the current Secretary, Mr. Carlucci.

In addition to the examples set by the Heads of this Department, there are several other reasons why political influence has not been a problem for DAEOs in DoD. Those chosen to serve in Ethics positions are persons of experience and maturity, individuals not likely to be improperly influenced by political considerations. The Standards of Conduct regulations of all of the components of the Defense Department support the role of strong, independent, DAEOs. Finally, any ethics official may seek guidance from the next level of authority or from the Office of Government Ethics. Such referral permits the DAEO to be removed from any local pressure which might influence him or her to give the expedient rather that the correct advice.

Ultimately, OGE serves as the "lightning rod" for the DAEOs of each of the Departments. Although I have not personally found a need to use OGE's good offices in this respect, the very existence of OGE strengthens our DAEOs in their work and helps prevent problems of political influence from arising.

Fourth, I will address your question about OGE's agency compliance reviews. This is an area where we have found OGE to be a nuisance, but perhaps the kind of nuisance we need. The individuals that have been assigned from OGE to review our records have had an in-depth knowledge of financial reporting systems and administrative management techniques. They have found flaws in our procedures and have been effective in asking those questions that sometimes have less-than-satisfactory answers. In other words, these audits accomplish exactly what they should accomplish: the auditors identify areas that need improvement and provide guidance to accomplish necessary changes.

As these auditors have worked in the various components in the Defense Department they have identified good ideas that should be shared and areas of confusion where DoD guidance may be improved. Because my Office is the focal point of Standards of Conduct policy in the Department of Defense, we have found this information enormously helpful. I am not aware of any additional subjects that should be covered by the OGE audits. I have no doubt that the OGE representatives would be willing to broaden the scope of any inquiry if contacted at the outset of an audit visit.

Finally, there is the subject of training. We are fortunate in this Department to have a number of individuals in key ethics positions who have had long years of experience in the program. One of the attorneys in my office, for example, assisted in the establishment of the Office of Government Ethics in 1979. With this reservoir of experience, we certainly have the capacity to train our own people. We also want our training to be closely tailored to the needs of the individuals and the unique characteristics of the Department of Defense. We can hardly expect that kind of individualized attention from OGE. For example, a member of my staff briefs each new political appointee in the Office of the Secretary of Defense. He relates the briefing directly to the new official's duties. Accordingly, I see no need for increased OGE involvement in the area of training individual employees.

In the case of continuing education for our DAEO's, however, OGE fulfills a very important role. The conferences hosted by OGE in past years have proven very valuable. Not only have the formal sessions been very productive but the interchange among the participants themselves has promoted understanding. We favor the re-institution of these OGE conferences. The occasional gatherings of Designated Ethics Officials that are held by Judge Nebeker also are valuable.

In closing, I would like to emphasize that the Department of Defense wholeheartedly supports the reauthorization of the Office of Government Ethics. OGE has helped to create an environment in which adherence to Standards of Conduct occupies its rightful place in the hierarchy of concerns for government employees. OGE has provided clear guidance in its directives and opinions and has actively sought to keep the workforce informed and educated. Under the leadership of Judge Nebeker we feel confident that OGE will continue its outstanding record of service to the departments of Executive Branch.

STATEMENT OF JOSEPH D. SHINE
TO THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

APRIL 13, 1988

Good morning. My name is Joseph D. Shine. I was formally the Designated Agency Ethics Official and the Special Counsel for Ethics for the United States General Services Administration (GSA). I am presently a Chief Deputy Attorney General for the State of South Carolina. I come before you at your invitation. My remarks are my personal views, and do not reflect any position taken by my past or present employers.

During the course of my discussions with you, I may say things that you may not want to hear. I do so, not to offend anyone, but because I care about our Federal Government.

I am interested in good Government. A strong, and viable national ethics program is the first defense against a moral decline in Government.

I have devoted most of my professional career to working in the public service. I want to play a role in creating a national structure that would help alleviate ethical lapses of our Federal officials. I am here out of a deep desire to have a Federal Government of integrity that we all can respect.

I thank you for this opportunity.

I. Relationship between OGE and DAEOs.

There is a major flaw in the fundamental relationship between the Office of Government Ethics (OGE) and Designated Agency Ethics Officials (DAEOs). OGE provides information to DAEOs, consults with DAEOs on agency ethics programs, monitors agency compliance with ethics regulations, particularly with respect to public and confidential financial disclosure requirements, and evaluates the effectiveness of DAEOs' ethics programs. There is no explicit reporting relationship, like a chain of command, by which the DAEOs report to OGE. OGE may request information from DAEOs. There is an expectation of cooperation which exists between OGE and DAEOs. However, the DAEO is appointed by the head of the agency in which he or she serves. The head of the agency is responsible under OGE regulation for the agency's ethics program. Therefore, the DAEO is accountable and responsible to the head of the agency. The DAEO is not independent. He or she is bound by the managerial direction and supervision of the head of the agency. Compensation, evaluation, tenure, and rewards for the DAEO come from the agency head.

If the head of the agency or his or her close advisors are involved in matters which constitute actual or apparent conflicts of interests, then the DAEO is in a difficult situation to act independently. OGE has no authority to protect the tenure of the DAEO in his position under this circumstance, or to insulate the DAEO from political pressure. This major weakness prevents the Federal Government from having a strong, independent and viable ethics program. The Director of OGE may intervene on behalf of the DAEO with the head of the agency, and use persuasion. The Director of OGE may use political influence or news media attention to effect some protection for the DAEO. All of these measures bring cold comfort to the DAEO who is on that lonely battleground protecting the public interest.

The DAEO is often required to provide interpretative guidance to agency employees using Federal statutes, case law, and regulations. There is no specific pre-qualification standard to be met by an individual who is to be appointed a DAEO. No specific requirement is stated that would have the prospective DAEO possess specific legal training, education, or experience. OGE only requires that the head of the agency ensure that the individual selected for DAEO have experience in administrative, legal, managerial or analytical work which demonstrates the ability to carry out certain enumerated responsibilities.

OGE has no uniform approach for institutionalizing the position of DAEO in terms of status, organizational support, and placement of the DAEO within the organizational hierarchy of an agency. OGE requires the agency head to make available to the ethics program sufficient resources (including investigative, audit, legal, and administrative staff as necessary) to enable the agency to administer its program in a positive and effective manner.

Query? Is any Director of OGE going to mandate or recommend to the head of a major Federal agency the amount of money that should be spent from an agency's budget for the ethics program even if present funding appears to be inadequate?

In closing out this issue, present regulation requires that the DAEO act as liaison with OGE. This circumstance creates a weak link to bind a national ethics program designed to protect the integrity of the Federal executive branch of government. Indeed, a stronger relationship between OGE and the DAEOs is needed for an effective ethics program.

II. Independence of OGE.

OGE is not sufficiently independent to carry out its statutory duties as a part of the Office of Personnel Management. The mission of OGE, protecting the integrity of our Federal executive branch of government, is too important to be submerged in a larger bureaucracy. The Director of OGE should report and be accountable directly to the President of the United States.

Under its present status, personnel staffing decisions of OGE are reviewed and affected by upper management of the Office of Personnel Management. This process undercuts OGE's independence. The Director of OGE is often viewed as a subordinate official by heads and staff of other major Federal agencies. In my opinion, this perception affects the Director's ability to persuade agencies to adopt corrective action.

To ensure independent action by OGE, the creation of a separate independent ethics organization is required. This independent ethics organization can then operate more freely and effectively from the bounds and political constraints (being a team player) that are often imposed on an organizational component of a larger bureaucracy.

III. Sufficiency of five-year term for Director of Office of Government Ethics.

The five-year term for the Director of OGE is not adequate. The Director should be given a longer term of office, for example seven years, that could overlap any Presidential administration. We need an independent Ethics Director. We do not need a Director who is appointed to the position because he wants to serve a partisan Presidential administration. We do not need a Director who may become an apologist for members of a Presidential administration.

The Director of OGE should only be removed for cause. This is the essential ingredient that is presently missing. Without this provision, the Director of OGE continues to serve at the pleasure of the President. Notwithstanding the five-year term, the President can still request the resignation of the Director of OGE for any reason.

IV. Protection of DAEOs from political interference.

I have indicated that the position of DAEO is a vulnerable one. If you are a GM/GS attorney-advisor serving as

DAEO, you have no civil service tenure or protection. All GM/GS attorneys in the Federal government serve with excepted appointments. As an attorney, you may be removed, reassigned, or terminated without recourse to the Merit System Protection Board. Your job security does not have to be threatened directly, or indirectly. You realize if you displease the boss by taking strong actions, you may find yourself exiled to the Siberian gulag. What is left for the DAEO is to be fortified by his or her personal sense of ethics to do what is right.

Not everyone can afford to take a personal stand like several top officials recently at the Justice Department, and resign from his or her position as a matter of conscience and protest. Most agency ethics officials at the working level are career public servants. This Subcommittee has an obligation to propose legislation that would protect these servants of the public interests from reprisal, actual or implied. If we are to have a Federal government that has creditability, integrity, and the respect of the American people, then agency ethics officials and their staffs must be protected from the winds of political expediency.

Presently, OGE has no such statutory authority to insulate the DAEO from being replaced by the head of an agency. Statutory authority, not regulations that could be considered by some to be aspirational in nature, is needed to provide the necessary remedial relief.

The establishment of a permanent corp of DAEOs, removable only for cause, would go far to provide the needed independence of judgment and action. This independent corp of DAEOs would operate much like administrative law judges. The appointment, tenure, and evaluation of the DAEOs would be determined by the Director of OGE. The DAEOs should be members of the Senior Executive Service because sufficient status is required in their dealings with top level Federal Government officials, including heads of major Federal agencies.

V. OGE's agency compliance reviews.

Agency compliance reviews by OGE is limited by the paucity of staff resources. If you have more auditors, then you can do more. Having agency compliance reviews every three to four years is inadequate. When the reviews do take place, they are often helpful in pointing out program deficiencies that should be corrected.

The lack of a truly independent Director of OGE may affect the forcefulness of recommendations going to agency heads. The Director may not have statutory authority to enforce corrective actions against an agency. If the Director of OGE does not have this authority, then agency compliance reviews may become mere paper exercises.

I have no independent basis for determining the scope and depth of agency compliance reviews performed by OGE at agencies other than GSA. However, OGE may want to examine more closely the actual operation of the screening systems that are employed to protect political appointees under recusal agreements against actual and apparent conflicts of interests. Physical examination of documents supporting the screening system including any listings of names of partners and business associates of the affected appointee is necessary. We must ensure that the screening procedures used in an individual case are effective. Often OGE will accept the assertions of the appointee, or the DAEO regarding the operation of the recusal system.

VI. OGE's ethics training program.

The content of OGE's ethics training is more than adequate. However, I would like to see more resources spent on developing generic video training films on ethics issues with appropriate guides and manuals. Greater emphasis should be placed on agencies to provide continuous ethics training.

All political appointees without regard to rank should attend a mandatory ethics briefing before their confirmation or appointment. This mandatory briefing should be sponsored by OGE. The ethics briefing should be a condition of employment. Once appointed, political appointees are often too busy carrying out the President's agenda to take time out for ethics briefings. Other priorities often take precedence.

VII. Recusal agreements.

If a recusal agreement is required for a political appointee, then OGE should require the appointee to agree to a specific written plan of action implementing the recusal agreement. Such matters as resources to be employed, the role of the DAEO in the screening process, and the nature of the information that will be made available to specific key management officials of the agency to avoid real or apparent conflicts of interests should be addressed. OGE should require the DAEO to provide a written plan for implementing the recusal agreement before the appointee is appointed or confirmed. There is very little leverage left with an appointee after he or she has taken the oath of office.

The Senatorial Committee considering any nomination should have available not only the recusal agreement but also the action plan of implementation. The agreement among the Director of OGE, the DAEO, and the appointee on what is required to protect the appointee from actual or apparent conflicts should be reviewed by the appropriate Senatorial Committee at the time of the confirmation hearing.

VIII. Conclusion.

In concluding my remarks, I want to leave a message that I hope will be remembered from my appearance before this Subcommittee. The message is one that cries out for the Subcommittee to recognize the need to protect the independence of judgment and actions of DAEOs.

I leave with you a hypothetical problem--

A certain Presidential nominee is required to execute a recusal agreement before he is confirmed in his position as head of a major Federal agency. This recusal agreement is signed and presented to the Senatorial Committee considering his nomination. The nominee is approved and is confirmed by the United States Senate. The action plan that is proposed by the DAEO to the head of the agency for implementing his recusal agreement is rejected. An alternative action plan is provided by the agency head with the approval of White House Counsel. This alternative action plan is given to the DAEO for review. The alternative action plan on its face appears to be adequate and valid, but it minimizes the role of the DAEO in the screening process used to protect the agency head from actual or apparent conflicts of interests. The primary person responsible under the alternative plan for screening all particular matters coming to the head of the agency is a close personal associate of the agency head appointed by the agency head to perform the screening duties.

What should the DAEO do?

How independent is the DAEO in this circumstance?

Is the choice of the action plan for implementing the recusal agreement a policy decision?

If so, who should make this policy decision for the agency?

The agency head is responsible for the agency's ethics program under OGE regulation. The DAEO is expected to present the agency's position, not his personal view, when communicating with OGE on this matter. This hypothetical problem illustrates the lack of independence of the DAEO.

If one concludes upon looking at these proceedings that the reality of politics has little room for ethics, I leave you with a parting thought from Rousseau (1876), "Those who would treat politics and morality apart will never understand the one or the other."

Thank you for your kind attention. I am prepared to respond to your questions.

Ethics in Government Act of 1978, as
amended by Public Laws 96-19, 96-28,
97-409 and 98-150

TITLE IV—OFFICE OF GOVERNMENT ETHICS

OFFICE OF GOVERNMENT ETHICS

SEC. 401. (a) There is established in the Office of Personnel Management an office to be known as the Office of Government Ethics.

(b) There shall be at the head of the Office of Government Ethics a Director (hereinafter referred to as the "Director"), who shall be appointed by the President, by and with the advice and consent of the Senate. Effective with respect to any individual appointed or reappointed by the President as Director on or after October 1, 1983, the term of service of the Director shall be five years.

AUTHORITY AND FUNCTIONS

SEC. 402. (a) The Director shall provide, in consultation with the Office of Personnel Management, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in section 105 of title 5, United States Code.

(b) The responsibilities of the Director shall include—

(1) developing, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations to be promulgated by the President or the Director pertaining to conflicts of interest and ethics in the executive branch, including rules and regulations establishing procedures for the filing, review, and public availability of financial statements filed by officers and employees in the executive branch as required by title II of this Act;

(2) developing, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations to be promulgated by the President or the Director pertaining to the identification and resolution of conflicts of interest;

(3) monitoring and investigating compliance with the public financial disclosure requirements of title II of this Act by officers and employees of the executive branch and executive agency officials responsible for receiving, reviewing, and making available financial statements filed pursuant to such title;

(4) conducting a review of financial statements to determine whether such statements reveal possible violations of applicable conflict of interest laws or regulations and recommending appropriate action to correct any conflict of interest or ethical problems revealed by such review;

(5) monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch;

(6) interpreting rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements;

(7) consulting, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest problems in individual cases;

(8) establishing a formal advisory opinion service whereby advisory opinions are rendered on matters of general applicability or on important matters of first impression after, to the extent practicable, providing interested parties with an opportunity to transmit written comments with respect to the request for such advisory opinion, and whereby such advisory opinions are compiled, published, and made available to agency ethics counselors and the public;

(9) ordering corrective action on the part of agencies and employees which the Director deems necessary;

(10) requiring such reports from executive agencies as the Director deems necessary;

(11) assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and in recommending appropriate amendments;

(12) evaluating, with the assistance of the Attorney General and the Office of Personnel Management, the need for changes in rules and regulations issued by the Director and the agencies regarding conflict of interest and ethical problems, with a view toward making such rules and regulations consistent with and an effective supplement to the conflict of interest laws;

(13) cooperating with the Attorney General in developing an effective system for reporting allegations of violations of the conflict of interest laws to the Attorney General, as required by section 535 of title 28, United States Code;

(14) providing information on and promoting understanding of ethical standards in executive agencies; and

(15) developing in consultation with the Office of Personnel Management and promulgating such rules and regulations as the Director determines necessary or desirable with respect to the evaluation of any item required to be reported by title II of this Act.

(c) In the development of policies, rules, regulations, procedures, and forms to be recommended, authorized, or prescribed by him, the Director shall consult when appropriate with the executive agencies affected and with the Attorney General.

(d)(1) Any rules or regulations issued under section 402 of the Ethics in Government Act of 1978 which are in effect immediately before the effective date of the amendments made by this Act shall remain in effect according to their terms until modified, superseded, set aside, or revoked on or after such effective date.

(2) The responsibilities of the Director of the Office of Government Ethics under paragraphs (6) and (12), respectively, of section 402(b) of the Ethics in Government Act of 1978, with respect to rules and regulations issued by the Office of Personnel Management before the effective date of the amendments made by this Act shall not be affected by this Act or any of the amendments made by this Act.

ADMINISTRATIVE PROVISIONS

SEC. 403. Upon the request of the Director, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Director to the greatest practicable extent for the performance of functions under this Act; and

(2) except when prohibited by law, furnish to the Director all information and records in its possession which the Director may determine to be necessary for the performance of his duties.

The authority of the Director under this section includes the authority to request assistance from the inspector general of an agency in conducting investigations pursuant to subsections (b)(3) and (b)(1) of section 402.

SEC. 404. In promulgating rules and regulations pertaining to financial disclosure, conflict of interest, and ethics in the executive branch, the Director shall issue rules and regulations in accordance with chapter 5 of title 5, United States Code. Any person may seek judicial review of any such rule or regulation.

AUTHORIZATION OF APPROPRIATIONS

SEC. 405. There are authorized to be appropriated to carry out the provisions of this title, and for no other purpose—

(1) not to exceed $2,000,000 for the fiscal year ending September 30, 1979; and

(2) not to exceed $2,000,000 for each of the nine fiscal years thereafter.

ANNUAL PAY

SEC. 406. Section 5316 of title 5, United States Code, is amended by adding at the end the following new paragraph:

"(146) Director of the Office of Government Ethics.".

SUBMISSION OF BUDGET

SEC. 407. (a) In the budget submitted to the Congress pursuant to section 1105(a) of title 31, United States Code, the President shall include estimated expenditures and proposed appropriations the President decides are necessary to support the Office of Government Ethics in the fiscal year for which the budget is submitted and the

(b) In the statement of changes submitted to Congress with respect to the budget pursuant to section 1106(b) of title 31, United States Code, the President shall specify the effect of such changes on the information submitted pursuant to subsection (a) of this section.

Executive Order 11222

PRESCRIBING STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

Part I—Policy

Section 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

Part II—Standards of Conduct

Section 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of—

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

Sec. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

Sec. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

Sec. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

Sec. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

Sec. 206. An employee is expected to meet all just financial obligations, especially those—such as Federal, State, or local taxes—which are imposed by law.

Part III—Standards of Ethical Conduct for Special Government Employees

Section 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code, who are employed in the Executive Branch.

Sec. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.

Sec. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.

SEC. 304. An adviser, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

SEC. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan or favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

SEC. 306. Each agency shall, at the time of employment of a consultant, adviser, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local governmental organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, owner, director, trustee, adviser, or consultant. In addition, it shall list such other financial information as the appointing department or agency shall decide is relevant in the light of the duties the appointee is to perform. The appointee may, but need not, be required to reveal precise amounts of investments. The statement shall be kept current throughout the period during which the employee is on the Government rolls.

PART IV—REPORTING OF FINANCIAL INTERESTS

SECTION 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions—

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

(2) A list of the names of his creditors, other than those to whom he may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom he may be indebted for current and ordinary household and living expenses.

(3) A list of his interests in real property or rights in lands, other than property which he occupies as a personal residence.

(b) Each person who enters upon duty after the date of this order in an office or position as to which a statement is required by this section shall submit such statement not later than thirty days after the date of his entrance on duty.

(c) Each statement required by this section shall be kept up to date by submission of amended statements of any changes in, or additions to, the information required to be included in the original statement, on a quarterly basis.

SEC. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

SEC. 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

(b) In the event any information required to be included in a statement required by or pursuant to this part is not known to the person required to submit such statement but is known to other persons, the person concerned shall request such other persons to submit the required information on his behalf.

(c) This part shall not be construed to require the submission of any information relating to any person's connection with, or interest in, any professional society or any charitable, religious, social, fraternal, educational, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise.

SEC. 404. The Chairman of the Civil Service Commission shall report to the President any information contained in statements required by Section 401 of this part which may indicate a conflict between the financial interests of the official concerned and the performance of his services for the Government. The Commission shall report, or by regulation require reporting, to the head of the agency concerned any information contained in statements submitted pursuant to regulations issued under Section 402 of this part which may indicate a conflict between the financial interests of the officer or employee concerned and the performance of his services for the Government.

SEC. 405. The statements and amended statements required by or pursuant to this part shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine for good cause shown.

SEC. 406. The statements and amended statements required by or pursuant to this part shall be in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, regulation, or order. The submission of a statement or amended statements required by or pursuant to this part shall not be deemed to permit any person to participate in any matter in which his participation is prohibited by law, regulation, or order.

PART V—DELEGATING AUTHORITY OF THE PRESIDENT UNDER SECTIONS 205 AND 208 OF TITLE 18 OF THE UNITED STATES CODE RELATING TO CONFLICTS OF INTEREST

SECTION 501. As used in this part, "department" means an executive department, "agency" means an independent agency or establishment or a Government corporation, and "head of an agency" means, in the case of an agency headed by more than one person, the chairman or comparable member of such agency.

SEC. 502. There is delegated, in accordance with and to the extent prescribed in Sections 503 and 504 of this part, the authority of the President under Sections 205 and 208(b) of Title 18, United States Code, to permit certain actions by an officer or employee of the Government, including a special Government employee, for appointment to whose position the President is responsible.

SEC. 503. Insofar as the authority of the President referred to in Section 502 extends to any appointee of the President subordinate to or subject to the chairmanship of the head of a department or agency, it is delegated to such department or agency head.

SEC. 504. Insofar as the authority of the President referred to in Section 502 extends to an appointee of the President who is within or attached to a department or agency for purposes of administration, it is delegated to the head of such department or agency.

SEC. 505. Notwithstanding any provision of the preceding sections of this part to the contrary, this part does not include a delegation of the authority of the President referred to in Section 502 insofar as it extends to:

(a) The head of any department or agency in the Executive Branch;

(b) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that Office; and

(c) Presidential appointees to committees, boards, commissions, or similar groups established by the President.

PART VI—PROVIDING FOR THE PERFORMANCE BY THE CIVIL SERVICE COMMISSION OF CERTAIN AUTHORITY VESTED IN THE PRESIDENT BY SECTION 1753 OF THE REVISED STATUTES

SECTION 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) as relates to establishing regulations for the conduct of persons in the civil service.

SEC. 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

PART VII—GENERAL PROVISIONS

SECTION 701. The Civil Service Commission is authorized and directed, in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

SEC. 702. Each agency head is hereby directed to supplement the standards provided by law, by this order, and by regulations of the Civil Service Commission with regulations of special applicability to the particular functions and activities of his agency. Each agency head is also directed to assure (1) the widest possible distribution of regulations issued pursuant to this section, and (2) the availability of counseling for those employees who request advice or interpretation.

SEC. 703. The following are hereby revoked:

(a) Executive Order No. 10939 of May 5, 1961.

(b) Executive Order No. 11125 of October 29, 1963.

(c) Section 2(a) of Executive Order No. 10530 of May 10, 1954.

(d) White House memorandum of July 20, 1961, on "Standards of Conduct for Civilian Employees."

(e) The President's Memorandum of May 2, 1963, "Preventing Conflicts of Interest on the Part of Special Government Employees." The effective date of this revocation shall be the date of issuance by the Civil Service Commission of regulations under Section 701(a) of this order.

SEC. 704. All actions heretofore taken by the President or by his delegates in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President or by his delegates in respect of such matters, shall, except as they may be inconsistent with the provisions of this order or terminate by operation of law, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

SEC. 705. As used in this order, and except as otherwise specifically provided herein, the term "agency" means any executive department, or any independent agency or any Government corporation; and the term "employee" means any officer or employee of an agency.

LYNDON B. JOHNSON

THE WHITE HOUSE,
May 8, 1965.

SF 278 (Rev. 1/85)
FPM Chapter 734
U.S. Office of Personnel Management

Financial Disclosure Report

Form Approved
OMB No. 3209-0002

Page 1

Reporting Status *(Check Appropriate Box)*

☐ Incumbent ☐ New Entrant, Nominee, or Candidate ☐ Termination Filer

Agency Use Only

OGE Use Only

Date of Appointment, Candidacy, Election or Nomination *(Mo., Day, Yr.)*

Termination Date *(If Applicable)* *(Month, Day, Year)*

Reporting Individual's Name
Last Name
First Name and Middle Initial

Position for Which Filing
Title of Position
Department or Agency *(If Applicable)*

Location of Present Office
Address *(Number, Street, City, State and ZIP Code)*
Telephone No. *(Include Area Code)*

Position(s) Held With the Federal Government During the Preceding 12 Months *(If Not Same as Above)*
Title of Position(s) and Date(s) Held

Presidential Nominees Subject to Senate Confirmation
Name of Congressional Committee Considering Nomination
Do You Intend to Create a Qualified Diversified Trust?
☐ Yes ☐ No

Certification
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.
Signature of Reporting Individual
Date *(Month, Day, Year)*

Other Review
(If desired by agency)
Signature of Other Reviewer
Date *(Month, Day, Year)*

Agency Ethics Official's Opinion
The information contained in this report discloses no conflict of interest under applicable laws and regulations.
Signature of Designated Agency Ethics Official/Reviewing Official
Date *(Month, Day, Year)*

Office of Government Ethics Use Only
Signature
Date *(Month, Day, Year)*

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for Income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I** (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II** (Agreements and Arrangements)—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Comments of Reviewing Officials *(If additional space is required, use the reverse side of this sheet)*

(Check box if comments are continued on the reverse side) ☐

278-109

NSN 7540-01-070-8444

PREVIOUS EDITION USABLE

SF 278 (Rev. 1 85
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting individual's Name	**Assets and Income**	**Page Number**		**Schedule A**

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000? ▼

BLOCK A **Assets & Income Sources**			**BLOCK B** **Valuation of Assets**							**BLOCK C** **Income**																	**BLOCK D** **Transactions Test**	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐			Category of Value (X)							Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)								Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss.	
			None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC	Exam-ples.	X Y Z Common				X				X									X								X	
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PREVIOUS EDITION USABLE

278-280

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U.S. Office of Personnel Management

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OMB No. [illegible]

Reporting Individual's Name

Page Number		Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC		Identification of Assets	Type of Transaction (X)				Amount of Transaction (X)					
			Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000
	Example	X Y Z Common	X			2/1/83			X			
1												
2												
3												
4												
5												
6												

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. **Exclude** transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), **exclude** gifts from relatives and **exclude** gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☐

S		Source (Name and Address)	Brief Description	Value
	Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
		Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1				
2				
3				
4				
5				
6				

PREVIOUS EDITION USABLE

278-108

SF 278 (Rev. 1/85)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Reporting Individual's Name

Page Number		Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X)				
							$10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Examples:	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs.			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1											
2											
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

Status and Terms of any Agreement or Arrangement		Parties	Date (Mo., Yr.)
Example:	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/76 ptnership agmnt.

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278-108

SF 278 (Rev. 1/86)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Reporting Individual's Name

Page Number		**Schedule D**

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (*Mo., Yr.*)	To (*Mo., Yr.*)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/78	11/83

Part II
Compensation In Excess Of $5000
Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

	Source (*Name and Address*)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction

PREVIOUS EDITION USABLE

278-108

Office of the Attorney General
Washington, D.C. 20530

MAY 4 1976

Attached hereto is a memorandum which provides guidelines concerning certain administrative investigations and the reporting requirements of Section 535 of Title 28, United States Code. The memorandum results from the joint efforts of this Department and the Civil Service Commission, and supersedes a February 9, 1971 memorandum from then Attorney General Mitchell on the same subject.

Sincerely,

Edward H. Levi
Edward H. Levi
Attorney General

Enclosure

Office of the Attorney General
Washington, D.C. 20530

MAY 4 1976

MEMORANDUM TO THE HEADS OF ALL DEPARTMENTS AND AGENCIES IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

The purpose of this communication is to provide guidelines concerning administrative investigations of Federal officers and employees for wrongdoing involving possible criminal violations, and to achieve fully the objectives sought by the reporting requirements of Section 535 of Title 28, United States Code. This communication is not intended to revoke existing specific memoranda of understanding between the Department of Justice and other Federal departments and agencies. This memorandum supersedes former Attorney General John N. Mitchell's February 9, 1971 memorandum to the heads of all departments and agencies concerning the reporting requirements of Section 535 of Title 28, United States Code.

Section 535 of Title 28, United States Code, imposes upon every department and agency of the executive branch of the government the duty to report expeditiously to the Attorney General any information, allegations, or complaints relating to violations of Title 18, United States Code, involving government officers and employees.[1/] Whenever a department or agency is uncertain as to whether referral pursuant to Section 535 of Title 28 is warranted, a designated representative from the department or agency concerned should consult with the concerned Division in the Department of Justice.

1/ For the purpose of the reporting requirement set forth in this memorandum, the phrase "government officers and employees" includes a former officer or employee (a) when the suspected offense was committed during his federal employment and (b) when the suspected offense, although committed thereafter, is connected with his prior activity in the federal service (see, for example, 18 U.S.C. 207).

Guidelines

1. Whenever information, allegations or complaints are obtained during an administrative inquiry, internal investigation, or otherwise, which indicate that an officer or employee may have violated the provisions of Title 18, United States Code, the department or agency, in the absence of any applicable exception referred to in 28 U.S.C. 535(b)(1), (2) and 535(c), or existing understandings or agreements with the Department of Justice, shall expeditiously notify the Department of Justice. All such information, allegations, or complaints should be reported to the local office of the appropriate investigative agency, the office of the United States Attorney for the district in which the illegal violation has occurred, and directly to the appropriate Division of the Department of Justice.

2. Upon making such referral, the referring department or agency should suspend any further administrative investigation and/or interrogation of the

employee with respect to the area of suspected criminality. However, if such independent administrative investigation is desired by the department or agency, it should be coordinated with the interested United States Attorney, Division in the Department of Justice, and/or investigative agency to insure that such administrative action does not jeopardize the government's criminal investigation or prosecution.

3. If the department or agency determines that disciplinary or other adverse action against the officer or employee is warranted, such action should be coordinated with the interested United States Attorney, Division in the Department of Justice, and/or investigative agency to avoid prejudicing the criminal investigation or prosecution.

4. If an agency of the Department of Justice declines criminal prosecution, the referring department or agency shall be informed as soon as possible. Further coordination between the referring departments or agency and this Department in connection with administrative proceedings is not necessary. However,

the referring department or agency, upon receipt of a request for information about administrative action, if any, taken or contemplated, should make a complete response within a reasonable time.

Attorney General

Office of the Attorney General
Washington, D.C. 20530

June 4, 1980

Attached is a memorandum which provides guidelines for you, your personnel officials, and your staff concerning procedures to be followed in administrative investigations of certain employee misconduct. This memorandum was developed as a result of inquiries from a number of federal agencies. It supplements the May 4, 1976 memorandum from then Attorney General Edward H. Levi on the same subject.

Ben Civiletti

Benjamin R. Civiletti
Attorney General

Enclosures

MEMORANDUM TO THE HEADS OF ALL DEPARTMENTS AND AGENCIES IN THE EXECUTIVE BRANCH

The purpose of this communication is to provide guidance concerning the necessity of giving warnings to the subject of administrative misconduct proceedings, the form which such warnings should take, and the need to coordinate with the Criminal Division certain actions that may impact adversely on the prosecution of criminal cases arising out of the same or parallel facts. This communication is intended to supplement former Attorney General Edward H. Levi's Memorandum of May 4, 1976 to the heads of all departments and agencies concerning the implementation of the reporting requirements of 28 U.S.C. 535.

Statements made by Federal employees during administrative misconduct proceedings frequently have substantial value as evidence in criminal prosecutions arising from the activity which led up to the administraive misconduct proceeding. On the other hand, actions taken by an agency during an administrative misconduct proceeding may impede the ability of the Department of Justice to prosecute criminal offenses arising out of the same underlying facts. It is important, therefore, that steps be taken to assure that statements made in the course of administrative misconduct proceedings are obtained through procedures that are consistent with the

Fifth Amendment protection against compulsory self-incrimination. Similarly, it is imperative that whenever a Department or Agency considers it necessary to obtain or induce the cooperation of their employees in administrative misconduct proceedings through procedures that may adversely affect the ability of the Department of Justice to discharge its paramount criminal law enforcement obligations, such procedures be coordinated beforehand with the Department of Justice.

1. Most administrative misconduct hearings involve situations where, under agency regulations, an employee is merely provided an opportunity to respond to questions concerning job-related misconduct. However, on occasion the cooperation of an employee in an administrative proceeding is deemed essential enough that the employee should be required to answer questions concerning his job-related misconduct or face dismissal for not cooperating. In this latter situation, any statement which the employee provides concerning job-related misconduct would be considered "compelled" for Fifth Amendment purposes, and as a result those statements and their evidentiary leads would not be admissible as evidence at a subsequent criminal prosecution of the employee. Garrity v. New Jersey, 385 U.S. 493 (1967). However, where an employee is merely afforded an opportunity to respond to a charge of misconduct, any statements made by him would not

be "compelled" for Fifth Amendment purposes, and such statements could be used in the preparation and prosecution of related criminal offenses provided other coercion was not present. See e.g., *O'Toole* v. *Scafati*, 386 F.2d 168 (1st Cir. 1967), *cert. denied*, 390 U.S. 985 (1968); *Terry* v. *United States*, 499 F.2d 695 (Ct. Cl. 1974).

In view of these considerations, I have decided that the following warnings should be given whenever a Federal employee is requested to provide evidence on a voluntary basis in connection with administrative misconduct proceedings. The purpose of these warnings is to prevent those providing statements from subsequently attempting to prevent their use by the Department of Justice in criminal litigation:

- - - You have a right to remain silent if your answers may tend to incriminate you.

- - - Anything you say may be used as evidence both in an administrative proceeding or any future criminal proceeding involving you.

- - - If you refuse to answer the questions posed to you on the ground that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent. However, your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case.1/

1/ See, e.g. *Baxter* v. *Palmingo*, 425 U.S. 308 (1975).

These warnings should be administered prior to questioning or taking a statement from an employee, and an appropriate record made of this fact.2/

2. In those exceptional circumstances where it is considered necessary or desirable to require employees to respond to questions concerning misconduct or face loss of employment, the Supreme Court has held that a termination may not be predicated solely upon a refusal to answer questions through an assertion of the Fifth Amendment privilege. Gardner v. Broderick, 392 U.S. 273 (1968); or because the employee refused to waive his Fifth Amendment rights, Sanitation Men v. Sanitation Commissioner, 392 U.S. 280 (1968). However, an employee may be dismissed for refusing in an administrative proceeding to answer specific, direct and narrow questions relating to the performance of official duties, when doing so will not result in the deprivation of Fifth Amendment rights. This state of affairs is confined for all practical purposes to those situations where the employee being interviewed has been provided with an express assurance that his answers will not be used against him in a criminal proceeding--a result tantamount to granting the employee "use immunity". Garrity v. New Jersey,

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2/ If the employee being questioned is employed in a bargaining unit with respect to which a labor organization has been accorded recognition as the exclusive representative of the unit's employees, 5 U.S.C. 7114(a) (2) (B) provides that the employee has a right to be represented during questioning by a representative of that labor organization, if the employee reasonably believes that the questioning may result in disciplinary action against the employee and the employee requests representation.

supra; Sanitation Men v. Sanitation Commissioner, supra; Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973).

Under no circumstances should a prospective interviewee with foreseeable criminal exposure be interviewed under an express or implied threat that he will be discharged if he refuses to cooperate in the investigation by invoking his rights under the Fifth Amendment, unless this course has been discussed with and approved by the Department of Justice. Requests for permission to utilize this interrogation procedure should be directed to the Justice Department component to which a referral of the matter would be made pursuant to 28 U.S.C. 535. Such clearance should be obtained before the witness is questioned. If clearance is obtained, the witness should be given the following warning prior to interview in order to avoid a challenge to a subsequent dismissal based on a claim that the employee was not adequately informed he had been given "use immunity."3/

- - - You are going to be asked a number of specific questions concerning the performance of your official duties.

- - - You have a duty to reply to these questions, and agency disciplinary proceedings resulting in your discharge may be initiated as a result of your answers.4/ However, neither your

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3/ Kalkines v. United States, 472 F.2d 1391 (Ct. Cl. 1973).

4/ An agency employee may be terminated or disciplined on the basis of the substance of a statement he voluntarily provides under a threat of termination even though he is not expressly advised of the fact he is being accorded "use immunity" with respect to his criminal liability. See, Womar v. Hampton, 496 F.2d 99, 109 (5th Cir. 1974).

answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings.

- - - You are subject to dismissal if you refuse to answer or fail to respond truthfully and fully to any questions.5/

3. *Promises and representations made informally* to prospective interviewees in administrative misconduct proceedings can likewise affect criminal liability, *Santobello* v. *United States*, 404 U.S. 257 (1971); *United States* v. *Rodman*, 519 F.2d 1058 (1st Cir. 1975); *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 406 U.S. 906; *cf. United States* v. *Long*, 511 F.2d 878, 880-881 (5th Cir. 1975). Under no circumstances should a department or agency enter into informal understandings or agreements with prospective witnesses in administrative misconduct proceedings which may be interpreted as waiving further criminal liability in exchange for cooperation in a continuing investigation involving himself or other employees, without prior consultation with and approval by the Department of Justice along the lines set forth in item #2 above.

4. A department or agency may agree to waive further *administrative discipline* in exchange for cooperation. However, whenever the employee in question faces foreseeable *criminal* exposure, the terms of any such agreement between the employee

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5/ Again, 5 U.S.C. 7114(a) (2) (B) provides that an employee is entitled to be represented during questioning by his labor organization if he is employed in a bargaining unit with respect to which a labor organization has been accorded recognition as the exclusive representative of the unit's employees, if the employee reasonably believes that the questioning may result in disciplinary action against the employee and the employee requests representation.

and the agency should be reduced to writing, and should contain the following written disclaimer:

"Nothing contained herein shall be deemed or construed to affect criminal liability or to limit the responsiblity of the Department of Justice to prosecute violations of Federal criminal laws. This agreement does not constitute a grant of immunity from criminal prosecution, and its acceptance by (the employee) shall constitute a knowing and personal waiver of rights under the Fifth Amendment to the United States Constitution."

The agreement containing the statement must be signed personally by the employee being interviewed. In the event that the employee's statement contains evidence reflecting that a criminal violation of Federal law has been committed, or in the event that other evidence is developed reflecting such a criminal violation, the signed statement containing the disclaimer shall be forwarded to the Department of Justice when the matter is referred pursuant to 28 U.S.C. 535.

B R Civiletti
BENJAMIN R. CIVILETTI
Attorney General

June 4, 1980

MEMORANDUM OF AGREEMENT

This memorandum records the following agreement between the Department of Justice (DOJ) and the Office of Government Ethics (OGE) relating to the responsibility of rendering formal advisory opinions with which the Director, OGE, is charged by section 402(b)(8) of the Ethics in Government Act of 1978, P.L. 95-521, as amended (the Act).

FIRST: That the functions of the Director, OGE, under §402(b)(8) of the Act include the rendering of formal written advisory opinions on matters of general applicability and important matters of first impression which involve the interpretation or application of any of the laws embodied in 18 U.S.C. 202-209 (conflict of interest laws).

SECOND: That the Director, OGE, shall consult with the Criminal Division, DOJ, before rendering an advisory opinion on an actual or apparent violation of any conflict of interest law. If after consultation the Criminal Division determines to undertake a criminal investigation, the Director shall not render an advisory opinion pending a determination by the Criminal Division not to prosecute.

THIRD: That if the Director, OGE, proposes to render an advisory opinion involving any conflict of interest law that in his judgment is an opinion on an important matter of first impression and if there has been no actual or apparent violation of such law in the matter, he shall consult with the Office of Legal Counsel, DOJ, before issuing the opinion.

FOURTH: That (a) any person who relies upon any provision or finding of an advisory opinion in accordance with subparagraph (b) and who acts in good faith in accordance with the provisions and findings of such opinion shall not, as a result of such act, be subject to prosecution under any conflict of interest law, and

(b) any advisory opinion rendered by the Director, OGE, under paragraph FIRST may be relied upon by (1) any person involved in the specific transaction or activity with respect to which such advisory opinion has been rendered and (2) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion has been rendered.

This agreement shall be effective May 19, 1980.

Department of Justice
by John M. Harmon
title Asst. Atty. Gen.-OLC
date May 7, 1980
by Philip Heymann
title AAG Criminal Div.
date May 17, 1980

Office of Government Ethics
by J. Jackson Walter
title Director
date April 24, 1980

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

March 21, 1988

The Honorable Frank Q. Nebeker
Director
Office of Government Ethics
1625 K Street, N.W.
Suite 600
Washington, D.C. 20415

Dear Judge Nebeker:

On April 13, 1988, the Senate Subcommittee on Oversight of Government Management will hold a hearing on the reauthorization of the Office of Government Ethics (OGE). To assist the Subcommittee in its preparation for the hearing, we ask that your office provide the Subcommittee with answers to the following questions:

(1) What were OGE's budget and staff levels for each fiscal year from 1984 through 1987? What are the budget and staff levels for 1988?

  a. What budget and staff levels did the Director of OGE request for each of these fiscal years?

  b. Has OGE been able to adequately meet its statutory responsibilities within those budget and staff levels? What areas, if any, have been negatively affected by these levels?

(2) Please provide data on the following for each fiscal year from 1984 through 1987:

- the number of agency compliance reviews conducted and audit reports issued;
- the number of corrective actions ordered;
- the number of instances where OGE recommended an agency head take action;
- the number of advisory opinions issued (formal and informal);
- the number of training courses conducted, including the approximate number of federal employees in attendance;
- the number of presidential nominees who were required to file initial public financial disclosure reports;
- the number of officials who were required to file annual public financial disclosure reports;
- the number of financial disclosure reviews conducted by OGE, identifying which were initial, annual, and termination reviews;
- the number of OGE financial disclosure reviews which took more than 60 days, more than six months, and more than one year to complete;
- the number of cases your office requested Inspectors General to investigate;
- the number of referrals of possible conflict-of-interest violations your office made to the Department of Justice.

(3) What statistics does OGE maintain on the ethics actions that originate from agency ethics offices?

a. Specifically, does OGE maintain data on:

- the number of allegations of violations of conflict-of-interest statutes that are received in those offices;

-- the number of those allegations that are referred to the Department of Justice from the agencies;

-- the number of waivers granted, divestitures ordered or administrative remedies obtained by agency heads or ethics officials?

b. What procedures exist for agency ethics officials to notify you of such actions?

(4) Since 1984, in how many cases have OGE's financial disclosure reviews, advisory opinions, or other actions been delayed or suspended due to the memorandum of agreement between OGE and the Department of Justice?

(5) Please describe OGE's program for training incoming employees, including presidential appointees, in federal ethics laws and standards of conduct. Describe OGE's program of exit counseling for employees leaving the federal government.

(6) To what extent does OGE review and monitor the relationship of the trustee and any financial advisors or consultants to the principal in a qualified blind trust reccognized by OGE? How does OGE attempt to ensure that there is no inappropriate communication between a trustee and the principal?

(7) Does OGE plan to take any action to review, revise, or expand existing compartmentalizations under 18 U.S.C. 207? In particular, what is your opinion of the existing compartmentalization of the Executive Office of the President? Is any change in that compartmentalization anticipated?

(8) Are there legislative changes or clarifications to any of the conflict-of-interest laws which you believe need to be made? For example, do you believe that there needs to be legislative clarification of terms in the conflict-of-interest law for current employees (18 U.S.C. 208), particularly in light of the Department of Justice ruling in January 1987 as to what actions are prohibited?

(9) Please describe OGE's preparations for the upcoming transition in administrations. In particular, please

note any effects on OGE's regular activities which might occur as a result of your transition responsibilities.

a. Please describe the expedited financial disclosure review process for presidential appointees used in the Carter-Reagan transition. Will this process be used in the upcoming transition?

b. On average, how long do you anticipate it will take for OGE to review a nominee's financial disclosure report and send an opinion letter to the Senate confirmation committee?

We would appreciate receiving your response by April 1. If you or your staff have any questions, please contact Curtis Copeland (Senator Levin) at 224-3682 or Mary Gerwin (Senator Cohen) at 224-5538 of the Subcommittee staff.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

CL:WSC:ljg

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

APR -4 1988

The Honorable Carl Levin Chairman Subcommittee on Oversight of Government Management Committee on Governmental Affairs United States Senate Washington, D.C. 20510-6250	The Honorable William S. Cohen Ranking Minority Member Subcommittee on Oversight of Government Management Committee on Governmental Affairs United States Senate Washington, D.C. 20510-6250

Dear Senator Levin and Senator Cohen:

The following information is provided to you in response to your letter of March 21, 1988, in which you asked a number of questions regarding the programs and activities of this Office. You indicated our response would be used by you to prepare for your Subcommittee's April 13, 1988 hearing on the reauthorization of the Office of Government Ethics. Your questions precede the answers.

(1) What were OGE's budget and staff levels for each fiscal year from 1984 through 1987? What are the budget and staff levels for 1988?

	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988
Budget Level (S&E)[1]	1,049	1,128	1,106	1,303	1,578
Staff Level (FTE's)	21.4	22.7	22.7	21.5	30.0

(The figures for FY 1984-87 are actual and for FY 1988 are current estimates.)

a. What budget and staff levels did the Director of OGE request for each of these fiscal years?

Budget Levels[1]

	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988
Budget Year					
OGE's Request	1,093	1,231	1,266	1,328[2a]	1,278
Operational Year					
Original Planning Level	1,001	1,120	1,133	1,060	1,536
OGE's Request	1,173	1,314	1,186	1,328	1,734
Final Level[2b]	1,115	1,141	1,137	1,340	1,580

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[1] Figures are expressed in thousands.

[2a] There was no call from OPM for a FY 1986-87 UPS submission (document in which OGE would request its levels for FY 1987). The level requested here reflects adjustment made to OPM's base level of $1,053 and 21.8.

[2b] Final level after review by O.P.M., O.M.B. and Congressional action.

Staff Levels

	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988
Budget Year					
OGE's Request	25.5	27.0	27.0	28.0[3]	28.0
Operational Year					
OPM's Planning Level	23.3	23.3	23.3	22.0	30.0
OGE's Request	25.0	27.0	25.3	28.0	35.0
Approved Level	23.3	23.3	23.3	23.0	30.0

b. Has OGE been able to adequately meet its statutory responsibilities within those budget and staff levels? What areas, if any, have been negatively affected by these levels?

Given current governmentwide budgetary constraints, all agencies have had to do some belt-tightening. We are continuing, however, to discharge our basic responsibilities, although we cannot do everything we would like, since resources are not unlimited. As funds permit in the future we would like to expand the Office to:

- implement a "desk officer" system, whereby each of the approximately 130 agencies which OGE audits is assigned a specific management analyst, thus increasing frequency of reviews and effectiveness of compliance enforcement, as well as providing more assistance with current problems and with the agencies' development and implementation of training programs. Presently, the Office has only five management analysts to review these agency ethics programs and performs reviews on a once every four or five year review cycle. These reviews reveal serious deficiencies which could be corrected and prevented from recurring by more concentrated monitoring by this Office;
- establish a statistical review and analysis unit which will compile government-wide statistics on conflict of interest prosecutions and standards of conduct violations in order to more effectively review agency programs and problem areas and respond to the numerous requests from Congress, GAO and the media for such statistical information;
- establish a fact-finding or adjudicatory unit to better carry out OGE's regulatory and enforcement functions, by insuring that designations, determinations, and orders which OGE is required by statute to issue are based on facts fairly determined. At present there is no way to determine disputed facts;
- create a full-time position to oversee improvements in content and delivery of awareness and compliance courses nationwide, including both regional updates and single topic conferences, and to better

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[3] Id.

meet agency needs by increasing frequency and quality of exposure to complex demand in conflict of interest matters;

- create a public affairs officer position to assist in expressing facts, policy and declarations as the ever-increasing demands for information from Congress and the press continue, to better respond to public inquiries and FOIA requests, to manage the task of assembling reports on the state of the ethics-in-government program and accomplishment of OGE's role, and to coordinate OGE's informal advisory letter and formal advisory opinion services and the newsletter;
- establish a program management office within OGE to handle the burgeoning administrative duties of overseeing a larger staff and the accompanying rise in personnel and procurement matters;
- respond to the national debate on government ethics by increased participation in public forums and state programs on conflicts of interest;
- meet an expected rise of day-to-day office operations in all areas of OGE's statutory mandate, as ethics sensitivity levels continue to mount.

(2) Please provide data on the following for each fiscal year from 1984 through 1987:

The number of agency compliance reviews conducted and audit reports issued;

	CY 1984	CY 1985	CY 1986	CY 1987
Headquarters Reviews	17	22	22	16
Regional Reviews	4	11	8	5

The number of corrective actions ordered and the number of instances where OGE recommended an agency head take action;

These two questions are treated jointly because this Office has not separated the kinds of actions required of the agency head from those required of the ethics official in any of the data which we have kept. In order to answer your questions as fully as possible, we are providing data on several types of actions requested or required by this Office during the period.

In reviewing the opinion letters sent by this Offfice to Senate confirming committees, we have found the following actions referenced in these letters as being required of or offered by the nominee:

	CY 1984	CY 1985	CY 1986	CY 1987
Recusal	22	53	15	40
Divestiture	4	8	6	11
Waiver	3	17	7	9
Resignations from other than present employment	10	10	9	9
Blind trusts	1	6	11	5

In reviewing all correspondence issued by this Office during the noted periods, we found the Office had requested both individuals and agencies to provide this Office with specific information or take some specific action and thereafter notify us. We also reviewed and approved, often with required modifications, agency regulations intended to be promulgated by them pursuant to E.O. 11222, the Ethics in Government Act, or 18 U.S.C. § 207.

	CY 1984	CY 1985	CY 1986	CY 1987
Request to an individual	20	14	11	1
Request to an agency	20	12	25	26
Regulation approval	20	20	16	35

Finally, as a result of the headquarters and regional agency reviews listed on page 3, the Office has recommended that some action be taken by the agency in most, if not all, instances. On the average, the Office has requested four separate actions by each agency audited.

The number of advisory opinions issued (formal and informal):

The Office has issued no formal advisory opinions pursuant to the regulations in Subpart C of 5 C.F.R. Part 738 during fiscal years 1984 though 1987. The Office received one request for a formal advisory opinion which met the requirements and criteria of sections 738.302 and 738.303, but the request was withdrawn. The Office has, however, continued to provide advice pursuant to § 737.305(a)(2) to individuals or agencies through written responses to letters requesting such advice, and through a series of memoranda sent to all Designated Agency Ethics Officials, Inspectors General and General Counsels. As in past years, many of these letters and memoranda have had identifying information excised, have been numbered and indexed and have been placed in our library. A digest of these selected letters and memoranda has been sent, on an annual basis, to each agency. Inclusion of a selected letter or memorandum in this "informal advisory" system, as you have termed it, was based upon its addressing an issue that had not been addressed before or addressing the issue in a fashion that might be of further assistance to readers. We have reviewed all correspondence issued by this Office for the calendar years 1984-1987 in order to determine how often the Office has provided written guidance. Since a smaller number of these letters and memoranda are excised and placed in the library for public review, we have also provided those numbers as a comparison.

	CY 1984	CY 1985	CY 1986	CY 1987
Written Advice	55	57	43	50
Excised Library Copies	16	19	19	14

The number of training courses conducted, including the approximate number of federal employees in attendance;

	CY 1984	CY 1985	CY 1986	CY 1987
Regional Training Courses (usually 2 days in each city)	11 cities	3 cities	5 cities	6 cities
Approx. Attendance	The average attendance was 50 employees each day.			

In addition to the regional training courses, OGE conducted numerous other training sessions for employees and ethics officials. In calendar years 1986 and 1987, we collected information on the number of ethics training sessions OGE staff members conducted throughout the executive branch and the number of people attending each session. These sessions were conducted at the Office of Personnel Management's Executive Seminar Centers in Oak Ridge, Tennessee, and Kings Point, New York, as well as at individual executive branch agencies. Each year we also conducted seven one-day training sessions for ethics officials in Washington, D.C.

	CY 1986	1/1/87 — 7/31/87
Number of Courses	83	40
Number of People in Attendance	2,995	1,832

The number of Presidential nominees who were required to file initial public financial disclosure reports;

	CY 1984	CY 1985	CY 1986	CY 1987
Nominee SF 278's	180	292	305	299

The number of officials who were required to file annual public financial disclosure reports;

The number of public financial disclosure reports filed annually throughout the executive branch is approximately 12,000. Our estimate of the total number of filers at the start of FY 1988 based upon employment statistics for full-time executive branch positions is 12,945.

The number of financial disclosure reviews conducted by OGE, identifying which were initial, annual, and termination reviews;

	CY 1984	CY 1985	CY 1986	CY 1987
Initial SF-278 Reviews	180	292	305	299
Annual SF-278 Reviews	762	881	756	653
Termination SF-278 Reviews	57	125	101	135

The number of OGE financial disclosure reviews which took more than 60 days, more than six months, and more than one year to complete;

The Office recognizes that under section 206(a) of the Act, OGE is to review reports transmitted to it within 60 days of receipt. While our reviews begin within the 60 day period, experience has shown that over 70% of the statements we receive require us to request additional information to complete a report or for this Office to make an adequate review. We pursue this information with diligence, but we deem the statute to require completion of the process within 60 days of adequate information being supplied. We meet that deadline. Further, data of the kind and in the form you have requested for six-month and one-year periods has not been kept by the Office, nor would it be feasible to compile it by April 1, 1988.

The number of cases OGE requested Inspectors General to investigate:

	CY 1984	CY 1985	CY 1986	CY 1987
Requested an IG investigation	2	2	2	3

These numbers are specifically for direct referrals by this Office to IG's on matters in which we requested a response. Many times this Office will refer a matter to the DAEO to investigate or to initially review if the agency does not have an IG or if we believe the DAEO may be more appropriate than the IG given the matter.

The number of referrals of possible conflict-of-interest violations OGE made to the Department of Justice:

	CY 1984	CY 1985	CY 1986	CY 1987
Referrals for Criminal Review	2	2	3	3
Referrals for Civil Action	1	10	1	0

In many instances, the agency where the individual involved is employed will refer a matter for criminal review with our assistance. These figures do not include those referrals. They include only those this Office made directly. The referrals for civil action were made pursuant to section 204(a) of the Ethics in Government Act for persons who knowingly or willfully failed to file or who knowingly and willfully falsified information on their public financial disclosure reports. Again, these figures do not include those instances where we assisted an agency in making the referral and are based on OGE's reviews of its correspondence files.

(3) What statistics does OGE maintain on the ethics actions that originate from agency ethics offices?

a. Specifically, does OGE maintain data on:

- The number of allegations of violations of conflict-of-interest statutes that are received in those offices;
- The number of those allegations that are referred to the Department of Justice from the agencies;

— The number of waivers granted, divestitures ordered or administrative remedies obtained by agency heads or ethics officials?

b. What procedures exist for agency ethics officials to notify you of such actions?

The Office keeps no statistics on the number of allegations of violations of conflict of interest statutes received by agency ethics offices, the number of agency referrals to the Department of Justice nationwide, or the number of waivers granted, divestitures ordered or administrative remedies obtained by the agency heads or ethics officials.

There is no requirement that ethics officials maintain this kind of information. Given the resources generally available for ethics programs, we view that conducting the program is a more effective use of agency resources than requiring an elaborate statistical retrieval system for information which may or may not reflect on the adequacy or effectiveness of the program or the activities of an agency's employees. We do coordinate with the Department of Justice in compiling information on the criminal conflict of interest cases that have been prosecuted by the Public Integrity Section and the U.S. Attorneys' offices. We have also asked the Inspectors General, through the auspices of the President's Commission on Integrity and Efficiency and as part of a pilot program, to notify this Office on a quarterly basis of the number of cases that they refer to the DOJ involving GS-15's and above. When specific information on a subject has been required by this Office, we have sent agencies a survey on that subject alone. The requested information did not contain statistics, but rather information on how a specific issue was being addressed by the ethics official and the agency.

(4) Since 1984, in how may cases have OGE's financial disclosure reviews, advisory opinions, or other actions been delayed or suspended due to the memorandum of agreement between OGE and the Department of Justice?

There are three memoranda that deal with this question. Our May 19, 1980 Memorandum of Agreement with the Department of Justice governs our issuance of advisory opinions. The Office also follows the 1976 and 1980 memoranda issued by the DOJ regarding procedures to be followed in administrative investigations during the time the same actions are under review for possible criminal prosecution. A review of the files of all of the Office's correspondence and of pending SF-278's, indicates that the Office has either referred a matter to the Office of Legal Counsel for review, deferred answering a question because of the Department's pending review for criminal prosecution, or delayed processing an SF-278 because of a possible criminal violation disclosed on the report, in the following number of instances during the periods:

	CY 1984	CY 1985	CY 1986	CY 1987
Deferrals	1	5	5	4

(5) Please describe OGE's program for training incoming employees, including presidential appointees, in federal ethics laws and standards of conduct. Describe OGE's program of exit counseling for employees leaving the federal government.

Training individual employees is the primary responsibility of the agency in which the employee serves. This Office, however, sent a letter to all major agencies offering to assist them in their training programs, including those for newly hired employees. It also prepared with the assistance of the President's Council on Integrity and Efficiency, a pamphlet entitled "How to Keep Out of Trouble," which is available for all agencies to purchase and give to their employees. In 1987, OGE also developed a videotape entitled "How to Complete the Executive Personnel Financial Disclosure Report." The tape features an enlargement of a completed SF-278 form with narration explaining each section. In 1988, OGE completed another videotape, entitled "Public Service, Public Trust." It reviews the conflict of interest laws and regulations applicable to executive branch employees, through narrative and example. Copies of both videotapes are available for agencies to purchase at a nominal cost.

In 1985 the Office also instituted a system of sending a letter regarding the executive branch ethics program to each Presidential appointee upon his or her confirmation. A copy of this letter is attached. In addition, the Office provided assistance to the National Academy of Public Administration when it developed "The Presidential Appointee's Handbook," which we understand is provided to all Presidential appointees by the White House.

With regard to exit counseling, the Office does not have any separate training program for negotiating for future employment and post employment restrictions as these are covered generally in all of our other training programs. The Office, of course, does assist individuals and agencies in specific cases, either over the phone or through letters, when such assistance is requested. Further, each agency is encouraged to provide information to employees who are considering leaving the government. When an agency's information program for exiting employees is found deficient by this Office in the course of a review, corrective action is required. Much remains to be done in briefings on negotiation for employment and post-employment restrictions.

(6) To what extent does OGE review and monitor the relationship of the trustee and any financial advisors or consultants to the principal in a qualified blind trust recognized by OGE? How does OGE attempt to ensure that there is no inappropriate communication between a trustee and the principal?

The Office requires all qualified trusts submitted for certification pursuant to the Act to provide that there be no communication relating in any manner to the trust and its assets, with limited exceptions, unless it is in writing and has the prior written approval of the Director of this Office. The exceptions are certain standard periodic reports to be made by the trustee to the beneficiaries pursuant to the statutory scheme. The prior approval of communications is a device to help ensure that the required confidentiality of trust operations and the independence of the trustee will not be compromised. The Act requires a complete separation of the Government official, the immediate family, and their representatives from most aspects of the trust's administration and management of its assets. Once a trust has been certified as qualified, the beneficiaries and their representatives may not even comment on such matters to the trustee, nor may they be informed by the trustee of trust activities. There are some limited exceptions provided by the Act.

As the administrators of the Act's blind trust provisions, we are well aware that there is a lack of familiarity in the private sector with federal blind trust practices. At the present time, there are only 24 federal officials who have blind trusts.

Those charged with responsibility for the admininstration and control of a qualified trust and the management of its assets must be independent of the interested parties — the Government official, the immediate family, and their representatives — in reality and in appearance. The fiduciary and anyone else assisting in management of the trust may not be affiliated with the interested parties, or subject to their control or influence. Indeed, except for persons who are designated in the trust instrument, the interested parties may not even know the identity of those persons who are utilized by the trustee in trust matters such as investment counsel, investment advisers, accountants, and those engaged for assistance in preparation of tax returns.

The primary monitoring of the relationship of the parties to a trust comes through our review of the periodic reports submitted by the trustee to the interested parties, and our prior review of any other trust-related communication through the screening mechanism noted above. It is not our practice to conduct field audits or investigations of trust matters. Given the reality that direct contact is always possible, reliance must be placed on the professional or institutional integrity of the fiduciary or those serving him. The codes of professional conduct for such persons or institutions are adopted and enforced by state entitites or federal banking authority. Ultimately, the trustee is subject to the statutory penalties in section 202(f)(6)(C) for inappropriate communications as well as potentially the penalties under 18 U.S.C. §1001 for false statements in conjunction with the annual certificate of compliance which must be filed with this Office.

(7) Does OGE plan to take any action to review, revise, or expand existing compartmentalizations under 18 U.S.C. § 207? In particular, what is your opinion of the existing compartmentalization of the Executive Office of the President? Is any change in that compartmentalization anticipated?

I understand the term "compartmentalization" to be a reference to designations under 18 U.S.C. § 207(d)(1)(C) and 207(e). The rules relating to such designations appear in 5 C.F.R. §§ 737.31 and 737.32. The former designates functionally separate and distinct "separate statutory" agencies under section 207(c), including the Executive Office of the President — the office of which you make particular inquiry regarding my opinion. The latter designates agencies so as to limit the restrictions or proscriptions of section 207(c)[4] where such agencies have "separate and distinct subject matter jurisdiction" and there exists no potential for undue influence or unfair advantage because of previous government service. I am told that the annual reviews required by subsection (d)(1)(C) were, because of resource limits, confined to the more critical Senior Employee designations under 5 C.F.R. § 737.33. Of necessity, review of section 737.32 agencies for designation has been left to the initiative of the parent agencies. With enhancement of the capabilities of this Office in the next two budget years, this and other necessary responsibilities will be discharged.

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[4] In passing I note that subsection (e) lacks any operative language such as the clause in subsection (d)(1)(C): "limit the restrictions of subsection (c)." Literally, it stands as a provision with no expressed purpose beyond a designation of separate and distinct function. I am informed that such designations are viewed as limitations on the restrictions of subsection (c) despite the absence of an essential operative phrase. Whether that is legally correct, I will not opine, save to note that we lack judicial interpretation on whether a designation of separate function of a separate statutory agency creates a defense as a matter of law or a question of fact.

Subsection (e) provides for no review of the separate statutory agencies, no doubt because of their relatively fixed functions. Presumably, a designation of separate statutory function remains valid until some change in function is made to appear. By the terms of subsection (c) the two-fold test for designation, i.e., separate statutory agency and functional separation, are ones of law from which designation follows upon an affirmative determination. In general, then, there is no plan to review, revise or expand the "subject matter jurisdiction" or the separate function designation.

Respecting your question about my opinion of the Rule designating the "Parent Agency: Executive Office of the President," and separate agencies, 5 C.F.R. § 737.31, I can inform you that I am undertaking to acquaint myself fully with this issue and to insure that this rule is based upon the application of standards made applicable throughout the executive branch.

(8) Are there legislative changes or clarifications to any of the conflict-of-interest laws which you believe need to be made? For example, do you believe that there needs to be legislative clarification of terms in the conflict-of-interest law for current employees (18 U.S.C. § 208), particularly in light of the Department of Justice ruling in January 1987 as to what actions are prohibited?

A thorough review of all of the criminal conflict of interest statutes has not occurred since 1962, when the statutes were recodified into ch. 11 of Title 18, United States Code. Because of the significant changes in the workforce and the types of financial interests now held by many individuals either currently serving or considering serving in the executive branch, it may very well be time to review these statutes again on a comprehensive basis. For example, the Office recognizes a rising concern with the application of section 208 to the financial interests of a spouse. With increasing frequency, the spouse of a government employee is also employed and has separate financial interests, and both the employee and spouse may have interests in nongovernment employee pension or other benefit plans and/or interests in investment vehicles, including mutual funds. The rise in the number of corporations with multi-faceted and changing business activities has also increased the complexity of applying the restrictions while still properly utilizing the services of any employee who may have a direct or derivative interest in such a corporation. Further, sections 203 and 205 need to be reviewed, if only to address their effect on representations that federal employees can make to the District of Columbia government. Many such employees live in the District of Columbia. Finally, I recommend a thoughtful review of the provisions which apply to special Government employees (SGE's), whether or not any changes are ultimately deemed necessary. This seems wise simply to reevaluate their effect given the expanded use of SGE's.

In my view, any such comprehensive review should be addressed as an individual project and not as a part of time-limited legislation or reauthorization. In that way there will be a clear opportunity fully and thoughtfully to address the complexities of the issues. Further, I believe strongly that piecemeal amendments to these statutes made to address perceived deficiencies in individual cases are not the appropriate manner to address the proscriptions.

The Department of Justice's January 1987 memorandum recognizes that the present restrictions of section 208(a) will apply to participation by an employee in such matters as rulemaking and certain policy decisions if the employee has a personal or derivative financial interest that will be directly and predictably affected. The memorandum focused on the term "particular matter" as used in that section and followed the guidance in an earlier 1978 Departmental memorandum. Because the term encompasses a wide range of activities, it makes counseling with respect to section 208 difficult. Agencies must begin to focus on a more frequent, yet proper, use of the waiver authority found in section 208(b)(1) and (2). The memorandum has also pointed out the wisdom of giving the Office of Government Ethics statutory authority to issue a general waiver under 18 U.S.C. § 208(b), published in the Federal Register, for certain kinds of financial interests which can be exempted on a wide basis. An example of that kind of waiver would be one for the interest of an employee in the assets of a diversified mutual fund in which the employee directly or indirectly holds less than one-half of one percent of the outstanding shares.

This Office has begun discussions with the Department of Justice regarding issuance of more detailed guidance for agency ethics officials to use in applying section 208 to many common situations. Those situations not covered by this guidance will then require more attention by counselors. Thus, we see this guidance as a method of assisting ethics officials in focusing more closely on those situations which may actually require recusals and waivers.

(9) Please describe OGE's preparations for the upcoming transition in administrations. In particular, please note any effects on OGE's regular activities which might occur as a result of your transition responsibilities.

The only practical way of handling the upcoming transition in administrations is to devote the bulk of OGE's time and resources to this single issue during the peak periods of activity. The entire staff will be divided into working teams in order to complete the review and certification process. By necessity, an interpretation in such areas of responsibility as training, audits, and opinion writing will occur. If necessary, I will request the temporary transfer of knowledgeable people from other agencies to maintain the Office's regular activities and meet the needs of transition. Additionally, we will maintain close liaison with key personnel in the Departments and agencies to ensure that the proper people are involved in the clearance process. By and large, the final report sent to a confirming committee is a reflection of the combined efforts of the nominee, the White House Counsel's office, agency ethics personnel and OGE.

We have written to individuals connected with both national political committees with a view toward working with the appropriate transition team to expedite and implement the nomination, confirmation and appointment process for the new administration. Ground rules on "intent to nominate" notices and procedures must be worked out in advance. I have offered to make my staff available for consultation and briefing on the Ethics Act and its impact on the entire transition process.

I anticipate that, during the time period before the inauguration, efforts of this Office not devoted to transition-related issues will probably be focused on providing advice on negotiating for future employment and post-employment restrictions and reviewing public financial disclosure termination statements.

a. Please describe the expedited financial disclosure review process for presidential appointees used in the Carter-Reagan transition. Will this process be used in the upcoming transition?

At the time of the Carter-Reagan transition, the Office assigned one senior staff attorney to serve as the liaison to the transition team in order to assist them with questions from potential nominees regarding the completion of the SF-278 forms and conflict of interest issues. The Act at that time required a nominee to file a public financial report with the agency in which he would serve within five days of nomination. Upon recognizing that waiting until actual nomination would significantly delay the confirmation process of Cabinet members who could not be nominated until the President had taken office, the transition team, and subsequently the White House, began seeking the financial disclosure forms directly from potential nominees as a part of other information required for clearance for nomination. In order to allow the agency and OGE ample time to review the forms for completeness and for conflicts, copies of these reports were provided to OGE and through this Office to the appropriate agency, prior to the individuals' nominations. In that way, insurmountable conflicts problems, or those which were prohibitively expensive to remedy, became apparent prior to an individual's actual nomination.

During this Office's 1983 reauthorization, the statute was amended to make clear that prospective nominees could properly file their reports within five days of an announcement by the President of an intent to nominate. The other issue that arose early in the Carter-Reagan transition, and which has still not been resolved, is the question of the date on which a prospective nominee's SF-278 becomes available to the public once a copy of it has been given to OGE and the agency. The statute requires public availability of an SF-278 within 15 days after its receipt by the agency and then by OGE. This subjects to public exposure individuals who have not as yet been nominated and who may not be nominated. The present solution is that the White House provides draft SF-278's to OGE and the agency and only releases the original to us after actual nomination, giving this Office, the agency and the individual an opportunity to agree on any necessary changes that will have to be made on the form and to the steps the individual will have to take to resolve any prospective conflicts once the nomination has been announced.

Assuming the new administration will wish to conduct its own initial conflict of interest review of potential nominees and continue to request the SF-278 directly from those individuals, we foresee the handling of the nomination/confirmation SF-278's to remain much the same. A clarification of the public availability issue of the pre-nomination forms would, of course, be of assistance.

b. On average, how long do you anticipate it will take for OGE to review a nominee's financial disclosure report and send an opinion letter to the Senate confirmation committee?

Based on our experience in the Carter-Reagan transition, we anticipate that OGE will be able to review a nominee's financial disclosure report and send an opinion letter to the Senate confirmation committee within three days of our receipt of the final disclosure report and agency opinion letter. Actual turnaround time will, of course, depend upon the condition of each report when it reaches our Office. As usual, we initially rely upon the White House to assist potential nominees, whose names are not yet known to us or the agency, in preparing their public financial disclosure reports as completely and properly as possible. Once the potential nominee is known and a draft or final copy of his SF-278 is available to us and the agency, we rely to a great extent on the work of the ethics staff at the agency in which the nominee would serve. If the agency and OGE are able to screen the draft reports of the nominees for completeness and to resolve potential conflict of interest issues at the draft stage, once the nomination is made and the final report is released, the turnaround time will be minimal. In cases in which we receive disclosure reports that are not properly completed, or with respect to which disclosed conflicts or appearance issues are not remedied, transmittal to the confirmation committee is delayed until such matters are resolved.

If the transition team assisting in selecting candidates for positions is aware of the conflict of interest and disclosure issues, they can help expedite this process by ensuring that the reports submitted to them are complete. Keeping the conflict of interest issues in mind, they can also attempt to place individuals in positions in which their financial interests will not create significant conflicts of interest.

Conclusion

The questions you have posed are most appropriate. They have illuminated a partial history of this ten year old Office. That history reveals a growth process from a very tentative and probing beginning. In addition, it reveals yet to be realized functions which are duties of the Office assigned but not fulfilled. With the concern for public confidence in government, the role of this Office is a vital one. Incidents of conflict of interest, proven or only alleged, are isolated and infrequent among the thousands who dedicate themselves to public service. This Office serves those thousands and the public needs to know that they can have confidence in them. That is our major role.

Sincerely,

Frank Q Nebeker

Frank Q. Nebeker
Director

Public Service - Public Trust

United States
Office of Government Ethics
P O Box 14108
Washington, D C 20044

MAR 25 [illegible]

Congratulations on confirmation and appointment to your new position. This Office recently reviewed your financial disclosure statement and I certified to the Senate confirmation committee that, based on that review, you were in compliance with the laws and regulations governing conflicts of interest. Those laws and regulations are in major part designed to enable you to perfom your duties unencumbered by extraneous and improper considerations.

The Ethics in Government Act requires that annually on May 15th you file an updated financial disclosure form. It also will be reviewed and certified to ensure that your current financial interests pose no actual, potential, or apparent conflict with your official duties. This annual report must be filed with the Designated Agency Ethics Official (DAEO) of your agency.

This Office cannot know of the many specific matters in which you must take action. Accordingly, certification of your financial disclosure does not itself end the need for you to be aware of specific conflicts or appearances of conflicts.

Financial disclosure is only one of the ethics requirements to which you are subject as a federal official. There are many more complex, and some say confusing, laws on conflicts of interest. There are also regulations regarding the standards of conduct governing the officeholder. It is in your own best interest to acquire a full understanding of these restrictions. I hasten to add that problems can arise on almost a daily basis. Sometimes they are not readily apparent. Thus, personal vigilance is important. If you see even a possible problem consult your DAEO.

Most newly appointed officials enter office as highly respected professionals in their field. They are confident that their understanding of ethical business practices will serve them well in the public sector. However, many have been rudely awakened to find themselves the subject of sensationalized allegations for actions they would have considered perfectly proper in the business world.

To ensure that you can avoid ethical problems, I urge that you contact your DAEO at your earliest convenience for a personal briefing on these very important laws and regulations. Also, feel free to contact me or my staff at 632-7642 for assistance. Whenever possible this Office will offer its advice on an informal basis. This has the advantage of consideration without delay. We recognize the need for immediate decision in many cases and are prepared to react.

This Office has recently produced a videotape of professional quality. It is of great help to anyone who must be attuned to government ethical restrictions. I urge that you view it and have your concerned subordinates see it also.

You may also wish to promote formal ethics training in your area of responsibility. By raising the awareness of these concerns, you can help avoid problems for others as well as yourself.

Sincerely,

Frank Q. Nebeker
Director

GAO United States
General Accounting Office
Washington, D.C. 20548

General Government Division

May 21, 1987

The Honorable Carl Levin
Chairman, Subcommittee on
  Oversight of Government Management
Committee on Governmental Affairs
  United States Senate

The Honorable William S. Cohen
Ranking Minority Member, Subcommittee
  on Oversight of Government Management
Committee on Governmental Affairs
  United States Senate

The Honorable Gerry Sikorski
Chairman, Subcommittee on Human Resources
Post Office and Civil Service Committee
  United States House of Representatives

On April 29, 1987, we briefed your offices on the results of our preliminary review of the government's procedures for enforcing federal conflict of interest laws. They asked that we provide you a written account of the briefing. The information presented in the briefing and our objective, scope, and methodology are summarized below and discussed in detail in the attached appendix.

The objective of our review was to gather some preliminary information on the process by which alleged violations of conflict of interest laws, particularly 18 U.S.C. 207 and 208, are investigated and resolved by federal agencies. We spoke with officials from the Office of Government Ethics and the Department of Justice about the process by which federal conflict of interest laws are enforced. We also spoke with officials of the Department of the Interior and the Environmental Protection Agency to gain a perspective on enforcement procedures at the agency level. The Inspectors General at those agencies said they conduct the initial investigations and refer those cases that they believe constitute violations of the statutes to either the Office of the U.S. Attorney or the Public Integrity Section of the Criminal Division in the Department of Justice. According to officials in the Public Integrity

Section, the Federal Bureau of Investigation also receives allegations of conflict of interest violations and conducts investigations either separate from or in concert with agency Inspectors General. The U.S. Attorney and the Public Integrity Section generally will prosecute those cases that they believe will result in felony convictions. Determinations of a lack of prosecutive merit can be based on one or a combination of various factors that are not ordinarily identified in letters of prosecution declination that are returned to the referring agency. Neither do such letters usually indicate whether Justice believes the case has merit or deserves administrative action.

Several of the officials we spoke with identified areas in the criminal statutes and in the enforcement process that they believe need to be improved. For example, several mentioned the difficulty of prosecuting conflict of interest cases as felonies, as is required in most conflict of interest statutes. They believed that a range of civil as well as criminal penalties in the conflict of interest statutes could facilitate prosecution of such cases. Also mentioned was the need for (1) regulations to define key terms in the statutes, (2) better coordination between the Office of the U.S. Attorney for the District of Columbia and the Public Integrity Section in the prosecution of cases, and (3) letters of declination that identify the reasons for declining prosecution and whether the cases have enough merit for administrative action. Officials in the Public Integrity Section do not believe these changes are needed.

We were able to obtain only limited information from the Office of Government Ethics on the issues raised in this report. Officials of the Office said they preferred to answer most of our questions in writing, and they are currently preparing their written responses. We will provide you a copy of their responses when they are received.

At your offices' request, we did not obtain official agency comments on this report. We did discuss the report with agency officials, most of whom said our reporting of their remarks was accurate. The Deputy Assistant Attorney General for the Criminal Division of the Department of Justice referred us to the Director of the Conflicts of Interest Crimes Branch, Public Integrity Section, for a statement of his views. The Director said the report did not accurately reflect his position. He requested that the complete records of Justice's testimonies before the House Judiciary Committee's

Subcommittee on Administrative Law and Governmental Relations and the Senate Judiciary Committee on conflict of interest legislation be included as appendices to this report as a complete depiction of his views. We did not do so because the testimony was voluminous and all of the testimony did not expressly address the issues in this report; however, we have cited portions of the testimony in the appendix. The complete record of that testimony can be found at Defense Procurement Conflict of Interest Act: Hearings on H.R. 2554 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 40-74 (1986) and Integrity in Post Employment Act of 1986: Hearings on S. 2334 Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 25-66 (1986).

Because our review was limited to the Office of the Designated Agency Ethics Official and the Office of the Inspector General at two agencies and one Office of the U.S. Attorney, no generalizations should be drawn concerning the enforcement procedures followed or the problems experienced in any of the other agencies or U.S. Attorneys' Offices. Also, the views expressed in this report are those of the individuals contacted and have not been evaluated or corroborated by other data.

As arranged with your offices, we plan no further distribution of this report until 30 days from the date of publication unless you publicly announce the contents earlier. At that time, we will send copies to interested parties and make copies available to others upon request. If you have any questions or need additional information, please contact me on 275-6204.

Rosslyn S. Kleeman

Rosslyn S. Kleeman
Senior Associate Director

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-225267

February 19, 1988

The Honorable Carl M. Levin
Chairman, Subcommittee on
Oversight of Government Management
Committee on Governmental Affairs
United States Senate

The Honorable William S. Cohen
Ranking Minority Member, Subcommittee
on Oversight of Government Management
Committee on Governmental Affairs
United States Senate

The Honorable Gerry Sikorski
Chairman, Subcommittee on Human Resources
Committee on Post Office and Civil Service
House of Representatives

This report is in response to your request that we gather statistics on federal agencies' enforcement of the criminal laws involving ethical misconduct of federal employees. Agencies must refer cases to the Department of Justice for prosecutive determination when their Offices of Inspectors General (OIG) find that violations of criminal statutes may have occurred. We agreed with the Subcommittees to select 10 agency OIGs and determine the actions taken on alleged violations of criminal conflict of interest statutes reported during calendar years 1985 and 1986.

From the 10 OIGs that we selected for our review, we found that agencies referred 124 allegations to the Department of Justice for prosecutive determination. Of those allegations referred, 112 were found by the OIGs to involve a possible criminal violation of the conflict of interest laws. The Department of Justice prosecuted 2 of the 124 allegations, one of which resulted in a conviction under criminal laws relating to subjects other than conflicts of interest, and the other is an open case. The Department of Justice declined to prosecute 107 of the referrals and had not decided whether to prosecute 13. The OIGs did not know the Justice Department's decision on two allegations. Agencies took administrative action (e.g., suspension or dismissal) on 22 allegations, including 16 of the 112 allegations that were found to involve a possible criminal violation and were referred to the Department of Justice. (The information we gathered is discussed in detail in app. I.)

As requested by the Subcommittees, we did not obtain official agency comments on this report. However, we did confirm the information presented in this report with officials from the 10 OIGs from whom we collected the case-specific data. We also discussed the results of this report with officials from the Executive Office for U.S. Attorneys and the Public Integrity Section at the Department of Justice.

The Legal Counsel in the Executive Office for U.S. Attorneys did not have comments on the results of the report.

The Director of the Conflicts of Interest Crimes Branch in the Public Integrity Section provided general comments on the enforcement of the conflict of interest laws. He said that additional options could be made available in the handling of conflict of interest violations. For one, he believes the conflict of interest statutes could be amended to provide for misdemeanor penalties in addition to currently available felony penalties and agency administrative actions. Secondly, additional civil sanctions could be provided; these sanctions might have a deterrent effect. Finally, the Director believes that consideration of administrative action is an important component of the enforcement scheme and, where appropriate, such action should be pursued. He also feels that an office like the Office of Government Ethics is an essential component of the conflict of interest enforcement scheme.

Our field work was done between March and October 1987. Because the case data obtained in our review was limited to the 10 agencies we selected, generalizations cannot be drawn about case trends in other agencies. We test-checked information which we obtained from the 10 OIGs by a questionnaire against agency case files. (See app. IV.) It was not within the scope of our review to attempt to verify the accuracy of the case files nor to determine whether the agencies' identification of conflict of interest allegations in their files was all-inclusive. This review was done in accordance with generally accepted government auditing standards. (See app. II for details on our objective, scope, and methodology.)

As arranged with the Subcommittees, we plan no further distribution of this report until 30 days from the date of this letter unless you publicly announce its contents earlier. At that time, we will send copies to interested parties and make copies available to others upon request. If you have any questions or need additional information, please contact me on 275-6204.

Rosslyn S. Kleeman

Rosslyn S. Kleeman
Senior Associate Director

Report

Public/Private Careers Project

December 16, 1987

Center for Business and Government
John F. Kennedy School of Government
79 John F. Kennedy Street
Weil Hall
Cambridge, MA 02138

INTRODUCTION

The Public/Private Careers Project was established in 1985 by the Center for Business and Government at Harvard University's John F. Kennedy School of Government. The project was conceived out of the conviction that the ready availability of some of our ablest men and women for public service in careers of limited but meaningful duration is one of the strengths of our society.,Three assumptions animated the project's creation: (1) the public and private sectors must work together more effectively if the United States is to succeed in solving its major problems; (2) the movement of able executives and professionals between the sectors is an important building block of improved understanding and a more productive relationship between the sectors; and (3) a number of barriers---financial, institutional, and cultural--have been erected in recent years to make such movement more difficult than before.

Over the next two years, the project, under its chairman, Henry H. Fowler, its director, Carl Brauer, and the Director of the Center for Business and Government, Winthrop Knowlton, set about to test whether its beginning assumptions were sound, and, if so, what could be done to improve the situation. Hundreds of knowledgeable people, from all levels of government, from business, and from the professions were engaged in discussions which took a variety of forms--individual conversations and correspondence; small group discussions in various cities; larger meetings in New York, Cambridge, and Washington.

The project participated in and cooperated with related efforts--the Presidential Appointee Project of the National Academy of Public Administration; the Conference on Public Service in the Year 2000 jointly sponsored by the American Enterprise Institute and the Brookings Institution, which set the stage for the National Commission on the Public Service, which is being chaired by Paul Volcker; and the work of the Center for Excellence in Government.

The research findings of the Presidential Appointee Project were particularly useful and valuable in documenting current difficulties with the "in-and-outer" system at the federal level. Tenure is down and turnover is up--Lyndon Johnson's senior appointees served 2.8 years on average while Ronald Reagan's served 2.0 years; a third of all appointees over the last twenty years have served 1.5 years or less. Today's appointees have less government experience than their counterparts twenty years ago. Political or ideological considerations, however, weigh more heavily than before in why they are selected. Recruitment of presidential appointees has become more difficult and, once chosen, appointees take longer to get on the job. Only twenty percent of appointees receive any formal orientation to their new positions. The financial sacrifices associated with public service have become greater, and in recent years, compliance with financial disclosure requirements has become daunting.

The original convictions of the project's founders were emphatically confirmed, though certain aspects of the problem, such as the relative quality and motives of today's public servants, are extremely difficult to measure objectively. It became clear as well that beyond any questions of business/government personnel movements and relations, there was a larger, quiet crisis of public service, which had many manifestations--declining interest on the part of young people in government careers; a socially-accepted emphasis on private gain, ambition, and success; a dispirited, undernourished, and aging civil service; and indifference toward the problems of public service by the leaders of American society. While some of these problems may be cyclical and, in a sense, self-correcting, others are clearly not.

With a presidential election just two years away, it seemed to the project's leaders in mid-1986 that an opportune time had come to examine various aspects of the issue in greater depth and to see if solutions could be found. Five task forces were then formed. Fred Fielding and Lloyd Cutler co-chaired a task force on ethics in government issues, which, in turn, had four subcommittees; Alexander Trowbridge led a task force on compensation; Anne Wexler headed a task force on public education; Roger Porter directed a task force on recruitment, orientation, and transition; and Winthrop Knowlton and William M. Batten co-chaired a task force on private sector attitudes toward public service. Over forty people, embodying a wide range of experience in government and in the private sector, served on these groups.

The task forces reported on their findings and suggestions at a day-long meeting at the Woodrow Wilson Center in Washington on May 6, 1987. Prior to and following the meeting, the project sent a questionnaire to two hundred interested and knowledgeable individuals, including all participants in the meeting. They were asked their opinions on the desirability and feasibility of forty-nine ideas, which had percolated up from the task forces and from other discussions. The ideas fell into two broad categories: institutional changes that could be made over the next year and a half to help the next president attract and retain outstanding people; and educational efforts which could begin now but which would require a long-term commitment and involvement. The (shorter-term) institutional changes were addressed primarily at the high level "in-and-outer" problem. The (longer-term) educational recommendations were addressed both to that issue and to the broader crisis of attitude toward public service in general in the United States. Forty-nine people completed the questionnaire.

On the basis of their responses, task force recommendations, and additional consultations, the project drafted fifteen specific recommendations in the summer of 1987, which it sent to its participants in mid-August for comment and possible endorsement. Their response has been overwhelmingly favorable and supportive. To date, more than one-hundred fifty people, representing a wealth of experience in government, business, and the professions, have written back or called and offered to lend their names as endorsers of this report and these recommendations as a whole, (which have been pared down to thirteen in number and slightly revised.)

Among the signers have been a dozen former Cabinet members, former and incumbent elected officials, numerous former and several current presidential appointees in departments, agencies, and regulatory commissions, state and local officials, professors and journalists, business and labor leaders, and eminent members of the bar. The endorsers include Democrats, Republicans, and independents, and they represent service to presidents from Roosevelt to Reagan. An endorsers' list accompanies this report.

An executive committee has been formed to educate the Congress, the White House, and the press about the importance of making the institutional changes recommended here and to determine how they can best be implemented in time for the next presidential transition. The executive committee is being chaired by Henry H. Fowler and includes John T. Dunlop, Fred Fielding, Candice Shy Hooper, Ray Kline, Winthrop Knowlton, Bruce Laingen, Bruce MacLaury, Robert McClory, William Morrill, Stanford Ross, Deanne Siemer, Elmer Staats, Alexander Trowbridge, and Anne Wexler. The educational recommendations, meanwhile, are being pursued by the Center for Business and Government and the Kennedy School of Government, by the National Commission on the Public Service, and by other educational institutions.

RECOMMENDATIONS

I. Institutional Changes:

A. The 1988 Presidential Transition

1. One of the most important and pressing tasks confronting newly-elected presidents is to find highly qualified people for appointive jobs in the executive branch. It is a job which requires more time than the three months which fall between election and inauguration. Under the Presidential Transitions Act of 1963, federal funds are made available to newly-elected presidents; this act should be amended so that a portion of these funds are made available to major party nominees for personnel planning in the event they are elected. Action required: congressional. Timing: before summer of 1988.

2. To facilitate effective personnel planning, information should be gathered and made available to the major party nominees by the Office of Personnel Management and the Office of Management and Budget on all Executive I-V positions. This information should include a listing of statutory and administrative responsibilities, congressional reporting requirements, budgetary histories, and a list of the names, addresses, and terms of service of living incumbents of these offices. Action: presidential and/or congressional. Timing: before summer of 1988.

3. Eighty percent of presidential appointees receive no orientation of any kind at the time their appointments begin.

All new appointees should receive careful and thorough orientation by the White House and by the departments and agencies they are joining. Orientation should constitute an important part of transition-planning and sufficient funds should be made available for it. Action: presidential and congressional. Timing: by summer and fall of 1988.

4. At the start of an administration, the need for background investigations of prospective appointees by the Federal Bureau of Investigation has sometimes caused unnecessary delays in making appointments. Some appointees have been given a "full field investigation," when a more focused and streamlined approach would have sufficed. The FBI and the White House should work together to streamline the process and the FBI should be given adequate resources to carry out required investigations in a timely fashion. Action: congressional and executive. Timing: by summer and fall of 1988.

B. Ethics legislation and regulations.

1. A substantial majority of recent presidential appointees report difficulty in understanding and completing financial disclosure forms. The forms should be simplified, and discrepancies and redundancies between the requirements of the executive and legislative branches should be reduced. Income and property value categories should be compressed into two categories, one of less than $10,000 and one of more than

$10,000. A uniform gift-reporting threshold of $100 should be adopted and only liabilities over $10,000 should have to be reported and briefly described. Public filing should be required only of those individuals who occupy high-level or especially sensitive positions, including all Senate-confirmable positions. Career officials above the GS-16 level, including members of the Senior Executive Service, and most political appointees should only be required to file an abbreviated, confidential (non-public) financial report. Action: congressional, Office of Government Ethics, and presidential. Timing: by fall of 1988.

2. Divestiture of certain assets is sometimes necessary to prevent potential conflicts of interest. Officials who are required to divest must now pay taxes on the divested property, however, which places an additional and unintended burden on them for performing public service. In these cases, nontaxable roll-overs of divested property into blind-trusts and/or diversified mutual funds should be allowed. Action: congressional. Timing: by summer of 1988.

3. Enforcement of ethics laws, including financial disclosure and post-employment restrictions, has relied too heavily on criminal standards and penalties, which has had the effect of weakening enforcement. Civil penalties and administrative remedies should be relied upon, except in the most egregious cases of misstatement and misconduct. Action: congressional. Timing: by summer of 1988.

4. Standards of conduct provisions are highly diffuse and out-of-date. The scattered statutory provisions governing the standards of conduct for government employees should be consolidated and updated and so should relevant Executive Orders. Action: congressional and presidential. Timing: by summer of 1988.

5. Post-employment restrictions have been the subject of controversy and misunderstanding, particularly with regard to how the one-year cooling off period pertains to high-ranking officials in the Executive Office of the President. A bright line should be drawn that precludes such officials from seeking substantive assistance from any government employee for one year after they have left the government. Action: congressional and/or executive. Timing: by summer of 1988.

C. Compensation

1. There has been a substantial erosion in the real pay of top-level federal officials over the last twenty years. The Presidential Appointee Project of the National Academy of Public Administration has shown that inadequate compensation contributes to high turnover among appointees. It also makes recruitment more difficult, especially for sub-cabinet level positions.

In December, 1986, the Commission on Executive, Legislative, and Judicial Salaries recommended pay increases that would have restored purchasing power lost during the last two decades. In submitting his budget on January 5, 1987, President Reagan substantially reduced the size of these increases. Under current law, his recommendations were to take effect if Congress failed to overturn them within a thirty-day period. The Senate voted against them within that period, but the House waited until the thirty-first day, permitting the increases to take place. (A procedural challenge to the increases is pending in federal court, but legislative efforts to reverse them appear to have ended.)

Current law requires the formation of a new pay commission in October, 1988. It is to report to the president by December 15, and the president is required, in turn, to submit as part of his January 5, 1989 budget a recommendation based upon the commission's findings. In his most recent recommendations, the President called the raises a "first step in addressing the loss of real income that top government officials have suffered from inflation over the past twenty years" and said he anticipated submitting another salary recommendation to Congress before leaving office.

The next quadrennial commission should adopt the reasoning and recommendations of its recent predecessors. President Reagan should accept the commission's recommendations and the president-elect should fully support him in this regard. If Congress should find it unacceptable to raise its own pay, it should either end linkage between legislative and executive compensation or modify existing linkage formulas. Alternatively, Congress might keep linkage as it is, accept higher salaries across-the-board, and bring its own income supplementation practices and rules into line with those of the executive branch. In this scenario, Congress would trade off outside income for higher salaries. Congress and the executive branch might also consider new ways to deal with the vexing problem of pay over the long run, including indexation.

The basic point is that the president's ability to recruit and retain the outstanding people needed at the top levels of the executive branch has been hurt by outdated and inadequate salaries. The next president must somehow be given the ability to recruit and retain top-flight personnel. Money should never be a motive for people to enter public service; on the other hand, insufficient compensation should not deter people from entering the government or cause them to leave it prematurely. Action: presidential, commission, and congressional. Timing: fall of 1988; winter, 1989.

II. Educational Changes:

1. There is a long tradition in this country of the private sector's loaning its talents to the public sector. Today numerous states and localities as well as the federal government are borrowing executives and professionals from the private sector for full-time or part-time temporary service. It appears that this phenomenon has taken on new vitality and significance, though it has received little publicity and has not been well

documented. Action: the Public/Private Careers Project will undertake to survey, document, and publicize the various kinds of loaned executive endeavors. Timing: 1988.

2. Job opportunities exist within government for experienced executives and professionals from the private sector. Many such executives and professionals would in theory be interested in pursuing these opportunities, but they do not know how to do so in fact. Action: the Kennedy School of Government is studying the feasibility of creating new executive and fellowship programs for facilitating mid-career transitions to public service, which could serve as models for other professional schools. Timing: 1988.

3. The challenge, value, and importance of public service jobs and careers need to be publicized--with the public at large, with business and media leaders, with colleges and professional schools, and with young people. For example, more attention should be given to how private institutions--business and financial corporations, colleges and universities, trade unions, and law firms--can make it possible for some of their ablest people to undertake public service for meaningful periods--two to four years--without sacrificing their standing in their normal careers. Action: the National Commission on the Public Service is undertaking a broad-based publicity and public-education effort. Various colleges and professional schools, including the Kennedy School of Government, are developing new public service initiatives. Timing: 1988.

Office of Government Ethics

ETHICS NEWSGRAM

Public Service - Public Trust

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A Perspective on Title 18 U.S.C. Section 207(g)

By Joseph D. Shine
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U.S. General Services Administration

Buried in the criminal post-employment restrictions is section 207(g) of title 18 of the United States Code. It is a little-noticed section which imposes restrictions on the activities that partners of current Federal government employees may conduct before the Federal government.

Section 207(g) states:

"Whoever, being a *partner* of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, *or which is the subject of his official responsibility*, shall be fined not more than $5,000, or imprisoned for not more than one year, or both." (Emphasis added).

In essence, section 207(g) prohibits partners of current Federal employees from representing persons or entities other than the United States before any agency or court of the United States or the District of Columbia on any particular matter in which the United States is a party or has a direct interest, and in which the Federal employee has participated or is participating, or which is the subject of the employee's official responsibility.

The statutory language leaves several questions unanswered. For example, what parameters apply to the definition of "partners"? Would limited partners be included in that definition? Limited partners are investors whose liabilities are limited to the amount of their investment in the partnership. In addition, they have no management role and no vote in partnership decisions. By comparison, general partners have unlimited liabilities, and they control and direct the partnership's activities. Although limited partners have less influence in the management of their investment than shareholders in a corporation, for investment purposes limited partners and shareholders are similar in nature.

There is little interpretative guidance on section 207(g). The Federal courts have not addressed this section and the Attorney General of the United States has failed to render a definitive opinion. The only guidance in this area is contained in informal advisory opinions of the Office of Government Ethics. In informal advisory opinion 81x34, dated November 23, 1981, the Office of Government Ethics stated that section 207(g) does not impose restrictions on employee-shareholders of a government employee's former law firm who are not also partners in the law firm. That conclusion indicates that the restrictions of

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Section 207(g)

section 207(g) would not apply to shareholders of a closely-held corporation or professional corporation. An earlier opinion of the Office of Government Ethics, 81x19, dated June 12, 1981, discussed the application of section 207(g) to limited partners.

"With the purpose of resolving the uncertainties of the statute by formulation of a reasonable standard, we have concluded that since a partnership enterprise, whether general or limited, produces operational relationships among partners, the partners so involved are subject to the prohibition of section 207(g). With respect to members of a limited partnership in particular, this means that general partners are invariably restricted from appearing before a limited partner in the Government and that limited partners are invariably restricted from appearing before a general partner in the Government."

On the question of whether a limited partner can appear on a matter in which a fellow limited partner has a role as a government employee, the Office of Government Ethics stated in opinion 81x19 that a distinction of scale is proper. In explaining that distinction, the opinion goes on to state:

". . . If the partnership is a vehicle for investment by a sizable number of generally unrelated persons, it is our view that non-Government limited partners are free of section 207(g)'s restraint. But if the number of partners is small, we deem it necessary to make a judgment as to the applicability of section 207(g) case by case."

In cases in which section 207(g) applies, it may be difficult for the government employee to take steps to avoid the restriction on his or her partners' representations to the government in certain matters. According to the statute, partners of government employees may not appear before the government in matters over which their employee partners have "official responsibility". The government employee's recusal from the matter would not remove section 207(g)'s restriction on his or her partners if the matter falls within the employee's official responsibility, as opposed to a matter in which the employee participates personally and substantially. In opinion 81x34, dated November 23, 1981, the Office of Government Ethics stated:

"However, a recusal from a matter within his "official responsibility" as defined in 18 U.S.C. 202(b), although appropriate for [the Commissioner] because of other concerns under Federal conflicts law, would not have the effect of removing such responsibility over the matter for purposes of section 207(g). Cf. 5 C.F.R. section 737.7(b)(5)."

The problem for partners of government employees is particularly acute when, as in the case of the head of an agency, all of the agency's activities would be under the employee's responsibility. Given that view, the partners of a high-level employee in the agency would, in essence, be restricted from representing anyone before the agency.

With the modern realities of the world of commerce before us, Congress needs to reexamine the scope of section 207(g) and provide a reasonable standard governing the disqualification of partners of employees of the Federal government. It may be reasonable to apply section 207(g) to partners of a business or professional enterprise of a type in which one would normally expect the individual participants to know each other and share in the management and operation of the partnership. On the other hand, it may be reasonable to exclude from coverage investment partnerships in which there are large numbers of passive investors who are unaware of who the other individual investors in the partnership are. Since the explicit language of section 207(g) does not lend itself to this last interpretation, Congress should address the issue so that its intent in this area is clear. In addition, Congress should consider enacting section 207(g) as a separate statute, rather than burying it in the post-employment statute, where it is clearly misplaced.

The opinions expressed in this article represent the personal views of the author and not the official opinion of the General Services Administration.

* * *

PRACTICAL
ETHICS
FOR GSA EMPLOYEES

As a Federal employee, you represent the Government to many people. In looking at you, the public expects to see the same qualities it demands from its Government—integrity, impartiality, and honesty.

Whether or not your work brings you in direct contact with the public, your actions must always be above reproach. It is not enough to act in a manner that you personally believe to be proper. You must adhere to standards of ethics that have been developed by GSA. Sometimes, this will entail avoiding situations that, although perfectly innocent, might give the wrong impression to others.

This pamphlet is designed to help you recognize some of these situations. Using examples, it provides practical guidelines, based on GSA's Standards of Conduct (ADM 7900.9). It does not replace the Standards of Conduct but merely illustrates some of them. Always consult your copy of the Standards of Conduct for the precise requirements.

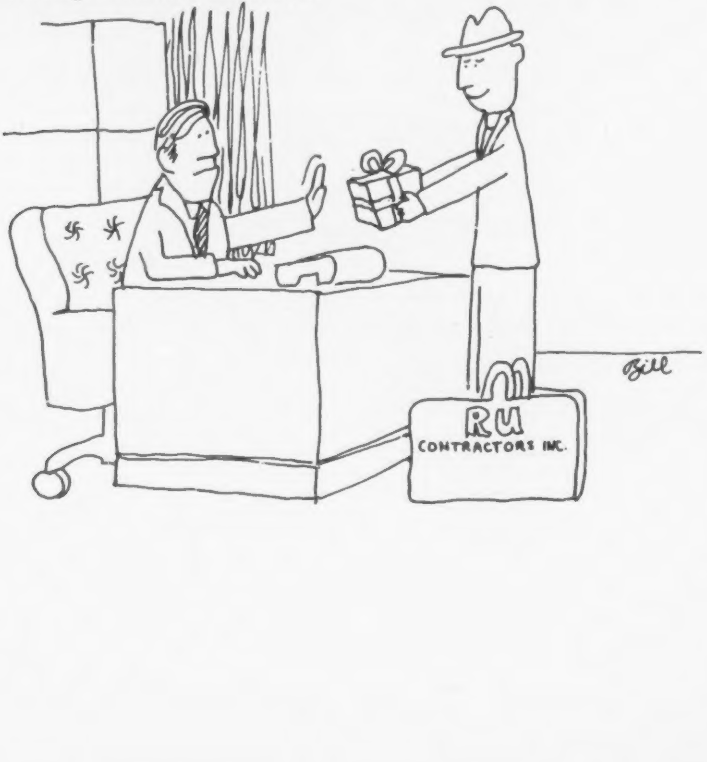
Remember, the Office of Ethics and Deputy Standards of Conduct Counsellors stand ready to assist you if you have any questions on the Standards or their applications. Consult your counsellor before you act. If you believe that anyone has violated the Standards of Conduct—or any other law, regulation, or directive—contact the Office of Inspector General through its local Office of Investigations. Telephone numbers are provided on the inside back cover for your convenience.

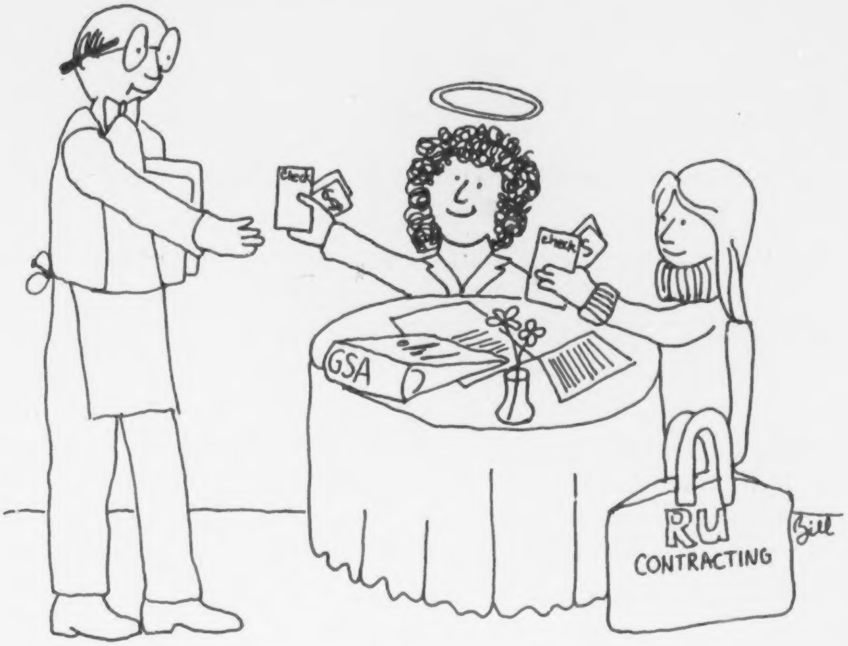
ETHICS
HALOS

ACCEPTANCE OF GRATUITIES

A GSA vendor stops by to discuss business. During the course of the conversation, the vendor hands you some novelty items — calendars, pens, cigarette lighters, and note pads — all bearing the company's name and business address. The "gifts" are only worth a couple of dollars, and all of the firm's customers are receiving them. Why shouldn't you accept them?

Despite the nominal value of the gifts, you **and members of your family** are not permitted to accept **any** gratuities from GSA contractors. Gratuities include: gifts, favors, entertainment, meals, refreshments, discounts, overnight accommodations, transportation, tickets, and passes. Gratuities do not include items such as: trophies, entertainment, or prizes given in contests open to the public; public service or achievement awards; and items available to the general public, such as university scholarships or free exhibitions.





You must maintain strict impartiality in your dealings with contractors and avoid giving the appearance of a lack of objectivity relative to firms. You must never allow your official actions to be influenced by special treatment or give the impression that they might have been.

If you are offered a gratuity or receive one through the mail or by other means, you must immediately report it to the Office of Inspector General and the Deputy Standards of Conduct Counsellor in the region where you work. In the example cited, you should first return the items to the vendor and explain that GSA regulations prohibit you from accepting them.

For more information on gratuities, see Section 105-735.202 of the Standards of Conduct.

GSA SALES

A family member will soon be leaving home for college and needs a typewriter for college assignments. GSA has scheduled a surplus property sale to dispose of a variety of items, including electric typewriters. Your official duties are not even remotely connected to the sales program. Are you (or a member of your household) permitted to participate in the sale?

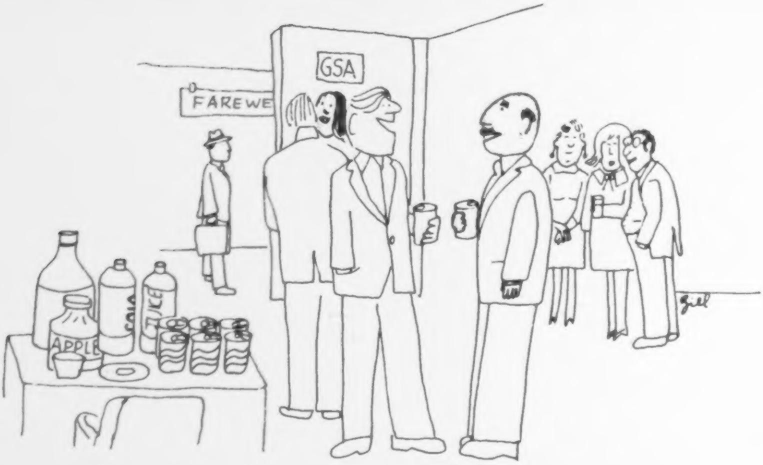
Even though your official duties do not involve the sale of real or personal property, you may not purchase Government property being sold by GSA for yourself or for any other person without the approval of the Administrator. Moreover, no member of your immediate household may purchase Government property being sold by GSA.

Special standards govern the purchase of real property when your official duties involve the acquisition and/or disposal of real property. Consult Sections 105-735.217 and 105-735.218 of the Standards of Conduct for detailed information.

ACME
Sale
ACME
DEPARTMENT
STORES
Bill

LIQUOR AND DRUGS

A co-worker has just accepted a new job and will be leaving soon. You'd like to wish her well by holding a wine and cheese reception in the office next Friday after work. Since it's after work hours, who could possibly object to serving a little wine?



Even though the party will take place after work, you are not allowed to drink liquor on Government-owned or -leased property without specific written approval. In Central Office, the Heads of Services and Staff Offices, Associate Administrators, or the Comptroller may authorize the use of liquor on special occasions. In the regions, the Regional Administrators have this authority.

The use of liquor or illegal drugs on Government premises is expressly prohibited. In addition, an employee's habitual use of intoxicants to excess is prohibited by law. See Section 105-735.219 of the Standards of Conduct for more information.

OUTSIDE EMPLOYMENT

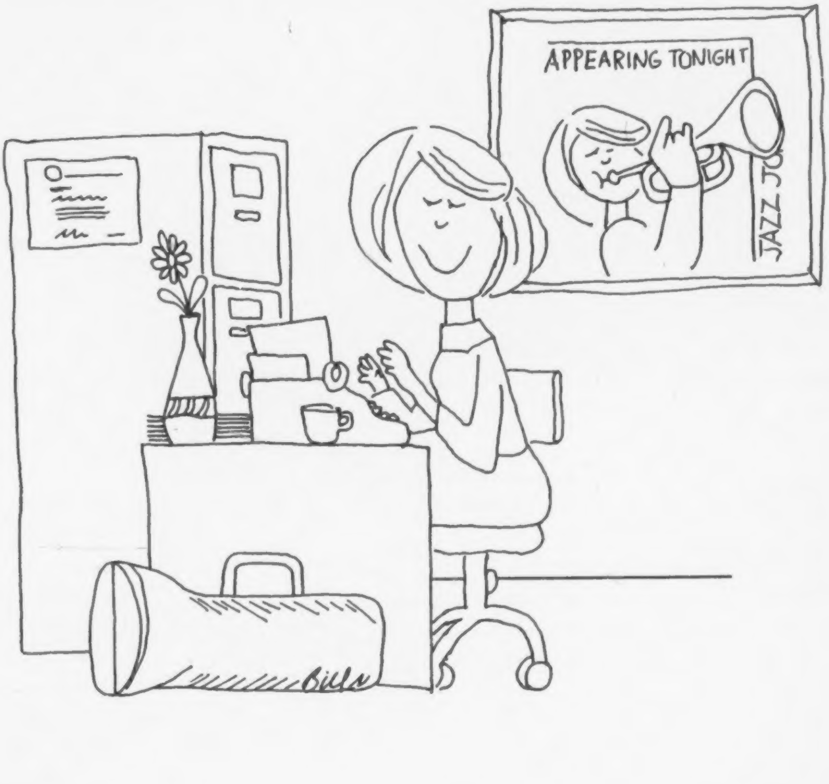
You're an accountant, and tax season has just begun. You could sure use the extra money from preparing tax returns to help pay your child's tuition or buy that new car you've needed for so long. Your Government position has nothing to do with taxes so there couldn't possibly be any conflict of interest, right?

The answer to this question may not be simple because of the number of firms and individuals doing business with GSA. That is why you **must** obtain the written approval of your supervisor **before** you engage in outside employment of **any** kind.

Outside employment is prohibited if:

- it violates law, regulation, local ordinance, etc.;
- it causes a real or apparent conflict of interest;
- it involves use of your time during official duty hours;
- it involves use of Government facilities or equipment, including telephones, typewriters, and duplicating machines;
- it involves use of information obtained as a result of Government employment that is not freely available to the public;
- it interferes with your performance of Government duties; or
- it identifies GSA or you as a GSA employee with a firm that manufactures, distributes, or advertises a product.

Other restrictions do apply to outside employment. A complete listing is contained in Section 105-735.204 of the Standards of Conduct.



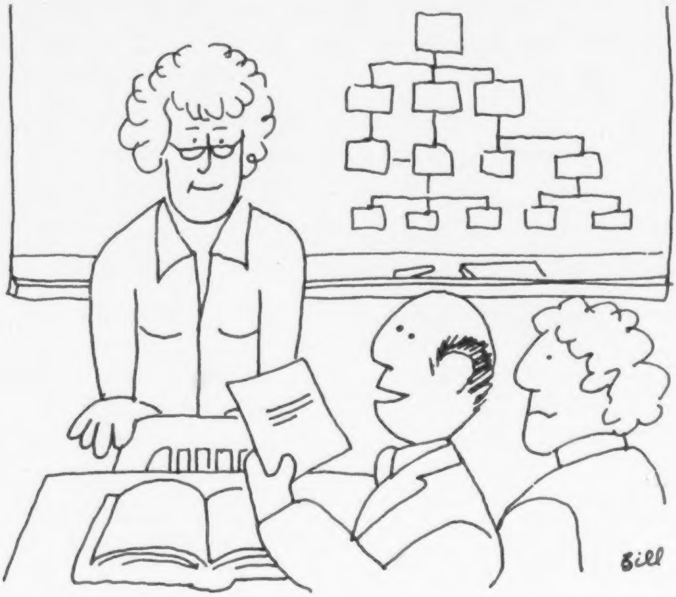
FEES FOR SPEAKING, LECTURING, OR WRITING

Through your job, you've become an expert on the GSA program area you direct. Because of the high visibility of this program, a private organization asks you to address its members at an upcoming convention. It offers you $500 to make the invitation more attractive. Can you accept this offer?

As a general rule, GSA personnel are encouraged to teach, lecture, and write. However, you may accept fees, reimbursements, and honoraria only if four basic conditions are met:

- it is not prohibited by law;
- you present yourself as a private citizen, not a Government official;
- these private activities do not interfere with your official duties; and
- your appearance or writing is not part of your official duties; does not involve materials that you must prepare as part of your official duties; and does not depend on information obtained as a result of Government employment, unless this information is available to the public.

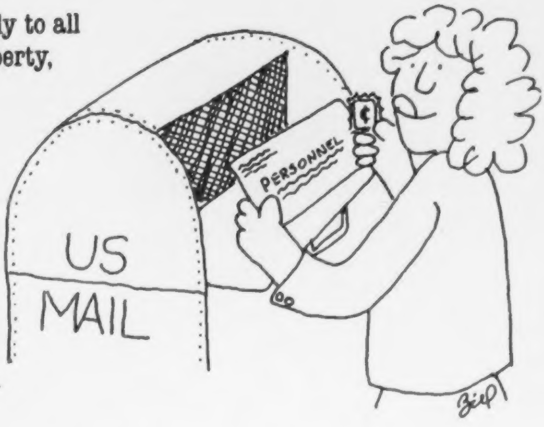
Remember to obtain your supervisor's approval **before** you engage in any of these activities, regardless of whether or not you will receive compensation. Section 105-735.204 of the Standards of Conduct provides detailed information on this form of outside employment.



GOVERNMENT PROPERTY, STAFF, AND FACILITIES

There is a vacancy in your organization for which you are highly qualified. In addition to involving very interesting work, the job would mean a promotion for you. Your SF-171 is up to date, so all you'll need to do is take it down the hall and make a copy. You will, however, have to prepare your responses to the quality ranking factors. Perhaps your secretary could type them if she has some free time. As long as you don't interfere with her performance of official typing, is there anything wrong with that?

There are several things wrong in this example. First, Government facilities, such as copying machines, are provided for use in conducting official business. Likewise, secretaries—or any other member of the staff—are here to perform official duties and should never be asked or directed to perform personal favors.



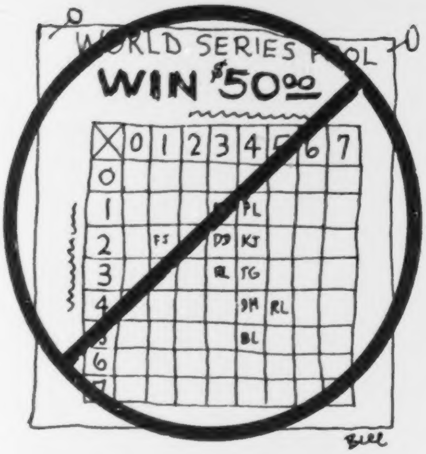
The same prohibitions apply to all Government facilities, property, and staff. For example, **never use**:

- telephones for unauthorized personal calls, especially long-distance calls or local toll calls;
- stationery, especially franked envelopes (postage-paid), for personal correspondence;
- computers to store personal information or to play computer games;
- chauffeur services for home-to-office transportation;
- credit cards for personal expenses; or
- credentials to obtain access to facilities or information for improper purposes.

Remember, you are expected to act positively to protect and conserve Government resources. Consult Section 105-735.206 of the Standards of Conduct for more information.

GAMBLING, BETTING, AND LOTTERIES

It's World Series time, and a co-worker asks you if you'd like to participate in the "office pool." For $1, you could win $50 if your team wins the pennant. Everybody in the office has already entered the pool. You don't want to miss out on this opportunity, do you?



Nothing could be more innocent than an office pool, right? Wrong! Gambling, unless specifically authorized by law, is illegal. You are prohibited from participating in any illegal gambling—lotteries, pools, numbers, games for money—while on Government-owned or -leased property or while on official duty.

Section 105-735.211 of the Standards of Conduct provides detailed information on gambling, betting, and lotteries.

GOVERNMENT VEHICLES

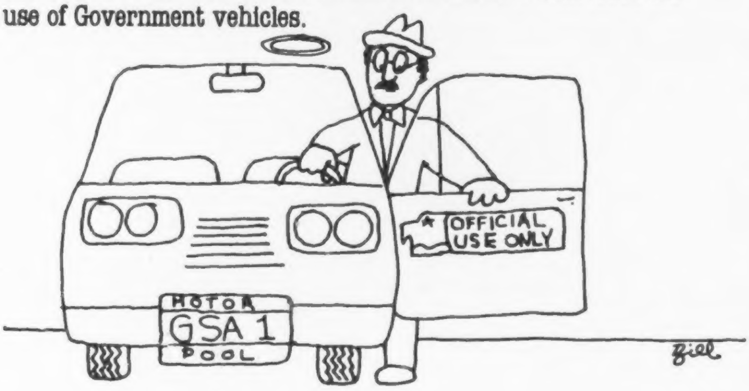
Your official duties necessitate the temporary use of a Government vehicle locally. As you head toward your official destination, you are in the general vicinity of a shopping mall you've been wanting to visit. This slight detour will only take 15 minutes, and it's close to lunchtime anyway. Who could object?

Government-owned or -leased vehicles may only be used by GSA personnel for official purposes. Therefore, you may not deviate from your official route for personal reasons.

In addition, you may not authorize the use of Government vehicles for anything but official Government business. This means you may not allow family members or friends to borrow a Government car assigned to you. It also means that you can't use a vehicle assigned to your office for personal excursions like luncheons.

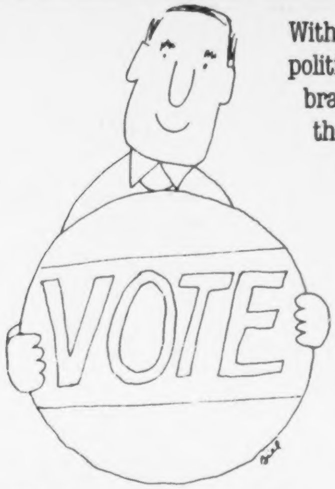
Likewise, you are required to operate Government vehicles in strict compliance with the law. Be sure you adhere to speed limits, traffic lights, and stop signs whenever you drive, but especially when operating a Government vehicle.

Section 105-735.220 of the Standards of Conduct addresses the use of Government vehicles.



POLITICAL ACTIVITY

At election time, a neighbor who's very involved in national partisan politics stops by your home with promotional materials—buttons and bumper stickers—for his party's candidate. He asks you to distribute these items in the neighborhood and the office. Is this activity permissible?



With very few exceptions, the political activities of all executive branch employees are limited by the provisions of the Hatch Act. Therefore, you would **not** be permitted to distribute promotional materials—at home or at work—since the Hatch Act prohibits Federal employees from actively participating in **partisan** politics.

Generally speaking, you **may not**:

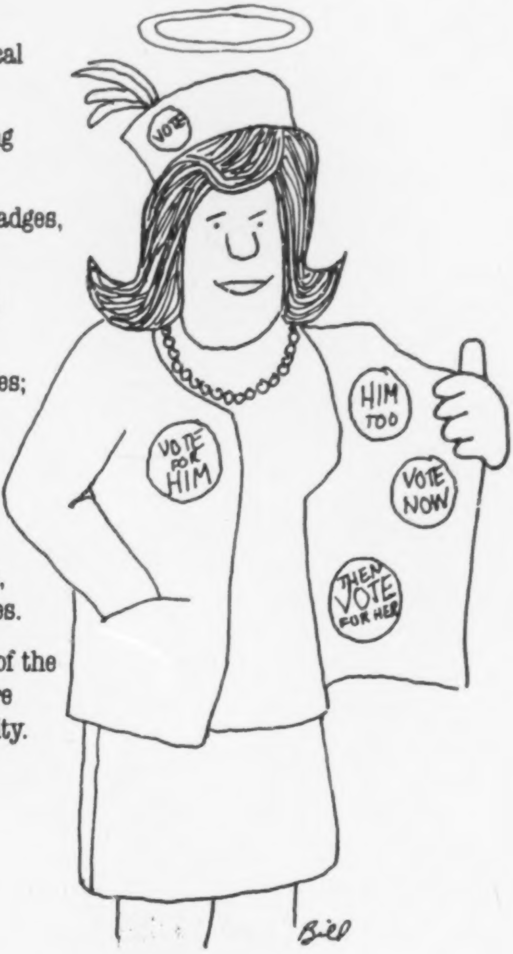
- be a candidate for public office in partisan elections;
- campaign for or against a candidate in partisan elections;
- make campaign speeches to elect partisan candidates;
- collect contributions or sell tickets to political fund-raising functions;
- organize or manage political rallies or meetings;
- circulate nominating petitions;

- work to register voters for one political party only; or
- hold office in political clubs or parties.

But you **may**:

- register and vote;
- assist in voter registration drives;
- express opinions about political candidates and issues;
- participate in nonpartisan campaigns;
- contribute money to political organizations;
- attend political fund-raising activities;
- wear or display political badges, buttons, or stickers;
- attend political rallies and meetings;
- join political clubs or parties;
- sign nominating petitions; and
- campaign for or against referendum questions, constitutional amendments, and/or municipal ordinances.

Consult Section 105-735.215 of the Standards of Conduct for more information on political activity.



OFFICIAL TRAVEL

Your boss has just advised you that you must travel to California on official business. You've never been there before and have accrued a week of vacation. Since the Government will pay for your return flight anyway, what difference could it make if you pay for meals and hotel but leave one week later?

The answer to this question depends on the official authorizing your travel. Although taking leave in conjunction with official travel is not a prohibited practice, authorizing officials are required to take into account the public's perception of the proposed leave before approving it. Remember, all authorized leave during the travel period **must** be reflected on the travel authorization and you must absorb any additional costs resulting from combining personal and official travel.

FINANCE
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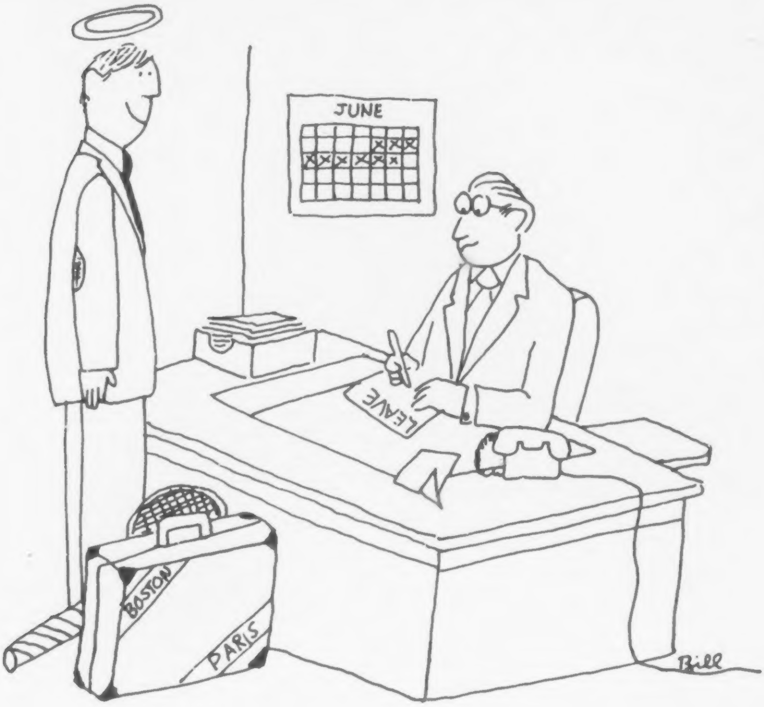
BONUS
Bill

Official travel must never be scheduled to accommodate personal travel desires. The practice of scheduling travel to a city where family members or friends reside and making a pro forma business visit is strictly prohibited. You are also prohibited from keeping promotional gifts such as travel coupons, free travel, and cash given by commercial carriers. All items of this nature must be turned over to the Office of Finance.

Consult GSA's Travel Regulations (PFM P 4290.1) and Section 105-735.205 of the Standards of Conduct for more detailed information on official travel.



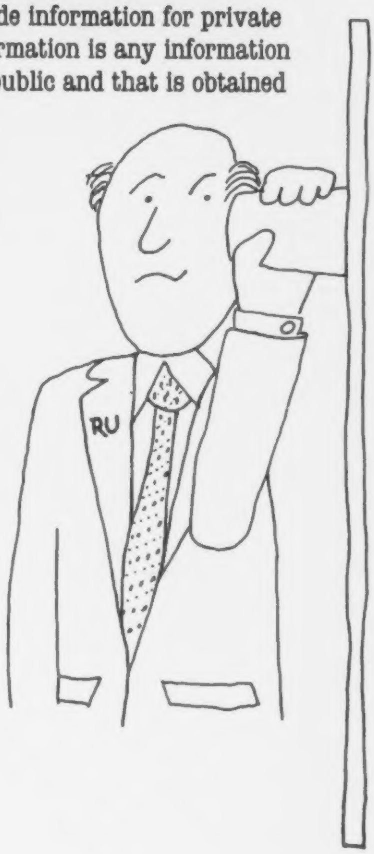
CONFLICTS OF INTEREST

As a result of your position, you know that GSA is about to award a major contract to a firm. When news of the award becomes public, the firm's stock will certainly increase in value. You consider purchasing some stock now—or advising family members and friends to purchase stock. Is this permissible?

No, you are prohibited from using inside information for private gain for yourself or others. Inside information is any information that is not generally available to the public and that is obtained by virtue of your position with GSA.

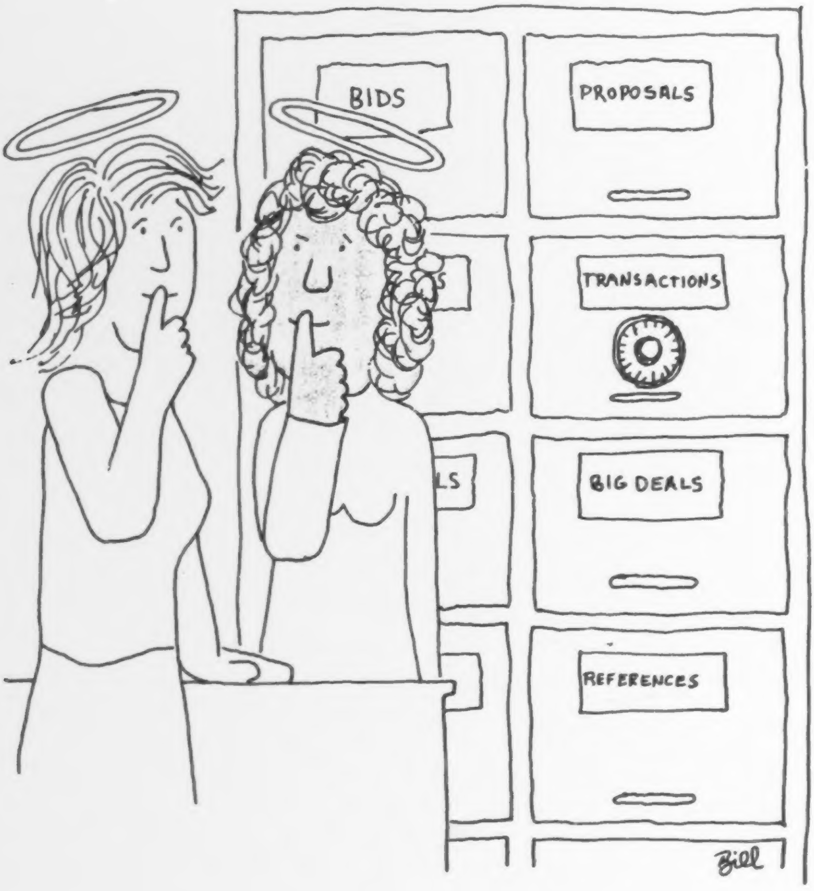
Using inside information for private gain is just one of several potential **conflict-of-interest** situations that you must scrupulously avoid. Others include:

- **Affiliations.** You may not engage in any personal, business, or professional activity that poses a real or potential conflict with the duties and responsibilities associated with your GSA position.
- **Financial Interests.** You may not receive or retain financial interests that pose a real or apparent conflict with your GSA position.



It may happen that interests or affiliations that had never previously created a conflict of interest suddenly do. In such cases, you must disqualify yourself in writing from performing the affected official duties. Over the long term, you may have to divest yourself of the affiliation or interest if it impairs your capability to do your job.

Consult Section 105-735.202 of the Standards of Conduct for more information.


BIDS
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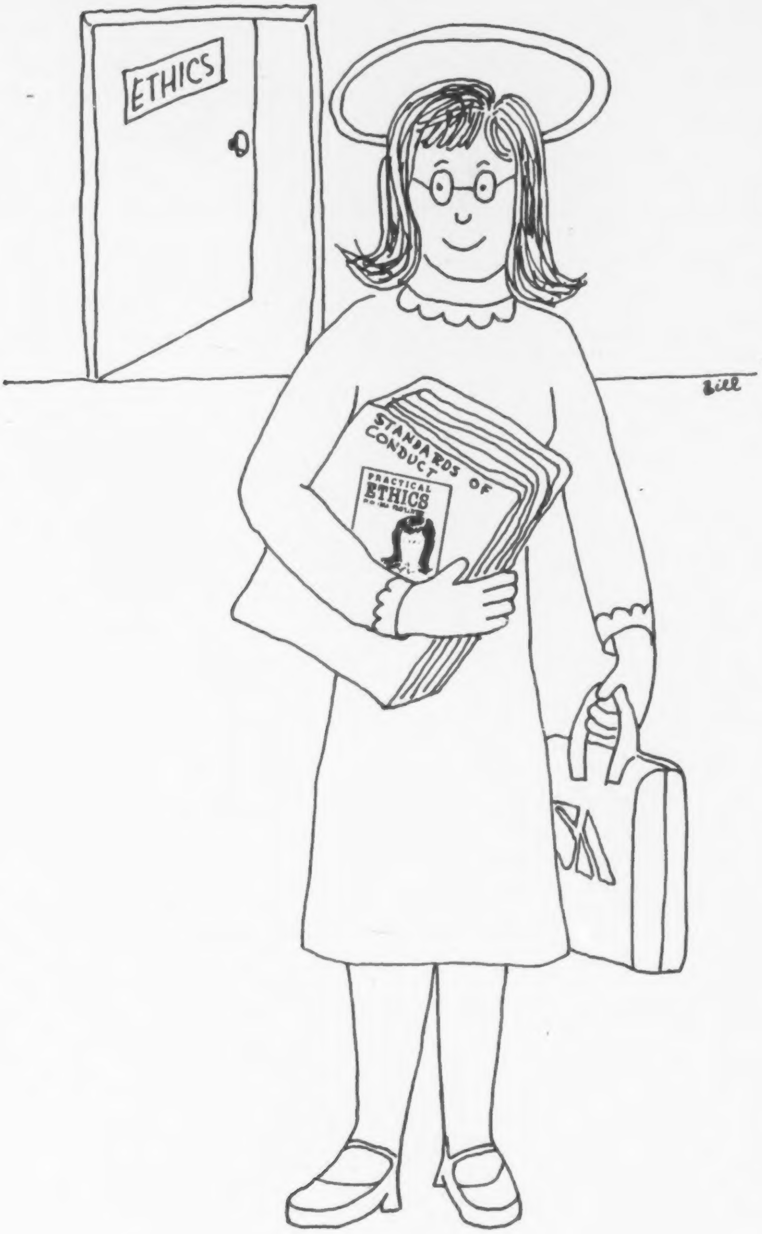
ETHICS
STANDARDS OF CONDUCT
PRACTICAL ETHICS
Bill

TELEPHONE NUMBERS

Staff members of the Office of General Counsel and Regional Counsel function as Deputy Standards of Conduct Counsellors.

The FTS telephone numbers are:

Regional Office	Deputy Standards of Conduct Counsellors	Office of Investigations
Boston, Mass.	223-2621	223-2700
New York, N.Y.	264-8306	264-7300
Philadelphia, Pa.	597-1319	597-1294
Atlanta, Ga.	242-3006	242-5126
Chicago, Ill.	353-5392	353-7779
Kansas City, Mo.	926-7692	926-7214
Fort Worth, Tex.	334-2325	334-2589
Denver, Colo.	776-7352	776-0067
San Francisco, Calif.	454-9309	454-9210
Auburn, Wash.	396-7007	396-7654
Washington, D.C.	472-1809	472-4152
Central Office	566-1460	566-1397

Office of Ethics 566-0765

To report suspected fraud, waste, abuse, or mismanagement, use the Inspector General's Hotline:

(800) 424-5210 or (FTS) 566-1780

The Hotline mailing address is:
Hotline Officer
GSA/OIG (JI)
Washington, D.C. 20405

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

November 8, 1985

MEMORANDUM FOR GENERAL COUNSEL
DEPUTY GENERAL COUNSEL
ASSISTANT GENERAL COUNSEL/LEGAL COUNSEL

SUBJECT: Oversight Responsibility for Standards of Conduct

I. Background: Ethics Program of the Office of the Secretary Defense

The responsibility for Standards of Conduct Program Management for the Office of Secretary of Defense currently is assigned to David O. Cooke, Deputy Assistant Secretary of Defense (Administration) (DASD(A).

Mr. Cooke is the "Designated Agency Ethics Official" for OSD. Previously, DoD General Counsel held that position. The assignment of DASD(A) was made by the Deputy Secretary of Defense on June 3, 1981. It was noted at that time (Memorandum - Acting OSD/GC - DASD(A), March 31, 1981, "Responsibility for Standards of Conduct Program Management") the "administrative skills and resources appear far more important to the success of this program than lawyer skills."

The memorandum explaining the assignment further stated "The main concern is to ensure that all of the important areas are covered and that, where possible, there is a rational sharing of the responsibilities." This obviously was of concern to the Office of General Counsel because before the transfer, responsibility for the implementation of the Ethics in Government Act resided with a counsel from OSD/OGC and a Personnel Staffing Specialist from Washington Headquarters Services.

Because of inadequate staffing support for this function in the Office of General Counsel, it was agreed to transfer the management of the Standards of Conduct (Ethics) to DASD(A). Additional reasons for the transfer are cited in the Acting OSD/GC Memorandum dated March 31, 1985 (attached).

The file on the transfer of the responsibilities does indicate in an intra-General Counsel Office memorandum that some concern was expressed as to the ability of the DASD(A) office to adequately "handle the assignment." The file reveals that within two years of the transfer deficiencies developed in the OSD Standards of Conduct Program. It appears that again it was the failure to devote adequate resources ("staffing") to the operation.

This was temporarily corrected by the assignment of two individuals in DASD(A), to the program on a "full-time" basis. However, the high turn-over of personnel minimized the "learning-curve" benefits necessary for a successful program management. It would appear that although some attempt at proper management has been made by DASD(A), the continuance of "full-time" staffing has ceased as a practical matter. Concurrent with the breakdown in staffing in DASD(A) the "legal" workload as the OGC counsel assigned to coordinate legal matters with DASD(A) experienced an increase. That condition has continued and the Standards of Conduct (Ethics) Management within the OSD is not only fractured, under staffed, but conducted on low priority level.

II. Selected Government Programs

For a proper evaluation of the management and priority given to the Ethics Program in OSD, a general comparison with other governmental ethics program has proved helpful. Obviously, the universe that falls within the OSD ethics jurisdiction is smaller than we find in a survey of departmental or even agency programs. However, the high visibility, in the current atmosphere that DoD/OSD officials face creates a magnified condition that requires organized and immediate attention.

An initial discussion with The Office of Government Ethics led me to interviews with the principal officials in charge of the ethics programs in National Aeronautics and Space Administration (NASA) and Department of Energy (DOE). Both have designated their Office of General Counsel as the office primarily charged with administration of the Ethics in Government Act. Specifically, the chief operational responsibility in NASA resides in the Assistant Counsel for General Law, and in DOE in Deputy Assistant General Counsel for General Law. Although both offices rely on their Management/Administration (Personnel) offices for basic administrative support (i.e., ethics briefing for lower grade employees; distribution of the Financial Disclosure Report, SF 278) the primary, legal and reviewing authority is in the Office of General Counsel. Both DOE and NASA have three to four attorneys working on ethics matters and are staffed with two to three administrative personnel.

DOE also has a procedure that requires all their employees except those using SF 278 and others occupying exempt positions to complete a "Report of Financial Interest" (DOE F 3735.1) which is initially reviewed by the employee's supervisor and finally by the designated attorneys in the Office of General Counsel.

The Department of the Interior, which I also checked, has a somewhat different approach to ethics management. In that department the Principal Deputy Assistant Secretary for Policy, Budget and Administration is the designated Ethics Official. In support, he has a staff of four that operationally process all Standard of Conduct matters. The operational office is headed by a Director, Ethics Office. There is coordination with the Solicitors Office on legal matters.

The General Services Administration presents a unique approach to implementation of the Act. That agency has created an Office of Ethics with a Director who reports directly to the administrator. The Director, who is an attorney, also serves as Special Counsel to the Administrator, acting as a personal representative of the Administrator in dealing with "ethics in government" matters. The Director is staffed with a Deputy (attorney), a full-time administrative individual as well as part-time administrative support in the Office of the Administrator. The Office of General Counsel also supports the program in the designation of four attorneys to assist in the counseling and monitoring of financial reports. Although the program is not within the Office of General Counsel it is entirely within the operational control of those with a legal background. The ethics training program originally conducted by the Office of Ethics is now shared with the Office of Information Resources Management. However, the office continues to monitor and direct the training program.

In all management and responsibility for the ethic program in 89 government departments or agencies is in the legal office.

III. Ethics in Government Statutory Requirements

Title 5, Code of Federal Regulations was amended (P.L. 96-28, June 22, 1979) to add Part 738 - Office of Government Ethics, Subpart B - Designated Agency Ethics Official.

§738.201 - §738.204. These sections spell out the responsibilities of the head of each government agency in administering the provisions of the Ethics in Government Act of 1978. These provisions (copy attached) are summarized as follows:

§738.201 - In general, the designation of a "agency ethics official" to manage the ethics program and to provide liaison with the Office of Government Ethics. The management responsibilities not only include implementing provisions of the Act but Executive Order 11222 (relating to Standards of Conduct for officers and employees within the executive branch) and regulation promulgated thereunder.

§738-202 - §738-204 - Places leadership responsibility on the agency head in establishing and supporting the agency's ethics program. Such support includes legal and administrative staff necessary for an efficient administration of the ethics program. This section authorizes the agency head to appoint a designated agency ethic official and his alternate, selected from officials with demonstrated administrative/management or legal experience.

The selected officials should have the ability to review financial disclosure reports, assessing the application of conflict of interest laws and regulations to the information reported. They must also counsel officers and employees concerning such conflict of interest laws or regulations. Overall, counseling of agency personnel on ethics standards and on post-employment regulations and reporting requirements are within their responsibilities. Additional administrative duties requiring a legal capacity to interpret the current ethical standards is required. Such officials must maintain a liaison with the Office of Government Ethics and oversee the initiation and maintenance of an ethics education and training program. The maintenance of a coordinated relationship with the Office of the Inspector General is an integral element of a successful agency ethic program.

IV. Office of the Inspector General: Recommedations

"1. The Office of General Counsel prepare a formal outline for advising senior officials on Standards of Conduct and, in the future, furnish them with a written summary of its advice as soon as practicable after responding to their specific inquiries."

"2. The "Standards of Conduct" regulation be revised to more clearly state the responsibilities of DoD employees and supervisors with regard to recusals from actual or potential conflicts of interest and 'affiliations.'"

V. Congressional Considerations

There is little question that the matter of ethics in government as well as ethics in dealing with government has and will receive considerable Congressional attention. It is not that ethical conduct has not been expected (nor violated) in the past but the increase of investigatory reporting has uncovered a small but highly publicized number of cases involving questionable ethical practices.

That governmental personnel are made aware of standards of conduct, conflict of interest guidelines and post-employment limitations, through training and educational programs is not currently regarded as meeting the needs of a viable ethics program. The counseling of departmental officials as well as the processing and reviewing of financial statements are regarded as minimum safeguards by Congressional critics. It is increasingly evident from Congressional hearings and floor debates that the Congress expects a high visibility in the ethics field and has underlined this viewpoint with increased financial reporting and employment limiting requirements. Specifically, in the area of national security have the opponents of expanded defense expenditures utilized the isolated cases of ethical violations to shoreup arguments for budget cutting.

Each potential conflict of interest or standard of conduct violation that can be avoided by an active and efficient ethics program deminishes the effectiveness of such "economy-in-defense" arguments.

VI. Office of Ethics Responsibilities

OSD implementation of the Ethics in Government Act and other standards of conduct rules entails responsibilities in two areas: operations and staff directions.

(A) Operational

The office must perform extensive operational functions for the Office of the Secretary of Defense and the Office of the Joint Chiefs of Staff as well as staff and policy guidance for the entire Department of Defense. These operational functions include the distribution and processing of the below listed reports. The management of the reports is handled by the Deputy Standards of Conduct Counselor, DASD(A). However, the ethic counsel, in OGC/DoD is charged with the responsibility to provide legal guidance and assistance to the Counselor if the processing of such reports so require.

1. Confidential Statement of Affiliations and Financial Interests (DD Form 1555). Each civilian employee, grade GS-13 and above, and military member, grade O-5 and above, having specified responsibilities, other than those identified in 2. below, is required to file annually a copy of DD Form 1555 (E.O. 11291; 5 CFR 735, Subpart D; DoDD 5500.7, par. XIX). Administration of this program requires the identification and notification of persons within OSD and OJCS subject to the requirement, providing the forms through supervisory channels, the review of completed forms, and necessary follow-up to correct incomplete or erroneous forms or to resolve problems identified during review. This responsibility has been handled by Deputy Standards of Conduct Counselor with legal problems referred to OGC counsel.

2. Financial Disclosure Reports (SF 278). This is the public disclosure reporting requirement imposed by the Ethics in Government Act. It covers all civilian personnel paid at the rate of GS-16, or more, all military personnel at grades O-6 and above, and all Schedule C appointees). This responsibility has been shared by OGC and DASD(A). DASD(A) identifies those subject to the requirement and provides the forms through supervisory channels. The initial report filed by all OSD civilian "Presidential Appointees" submit their reports directly to the OSD General Counsel for final review. Review of such reports is also performed by DASD(A) and the Office of Government Ethics. Final transmission of the initial reports filed by nominees is made to the Senate Armed Service Committee. Copies are retained by DASD(A).

3. Report of DoD and Defense Related Employment (DD Form 1787). Certain former military officers and DoD civilian personnel who within three years of date of association with DoD

are employed by designated defense contractors (those having negotiated DoD contracts totalling $10 million per year or more) must file DD Form 1787. Civilian officers and employees of OSD or the Joint Chiefs of Staff file these reports with the Deputy Assistant Secretary of Defense (Administration), OASD(C). The Standards of Conduct Counselor, DASD(A) reviews the reports and forwards them to the Office of Force Management and Personnel, OASD(C), for eventually submission to the Congress.

It should be here noted that the Defense Authorization Act of 1986 contains provisions that broaden the scope of these reports, requiring far more detailed information. The additional information, plus the granting of authority to the Secretary of Defense to impose penalties for non-compliance, adds emphasis to the importance the Congress had put on these reports. This Congressional action requires that the processing of the reports be conducted in a manner that would uncover possible conflict of interests. Both the Deputy Standard of Conduct Counselor and the ethics counsel in DoD/OGC will be required to perform additional reviewing functions.

4. Individual Counseling. Both the Deputy Standards of Conduct Counselor and the ethics counsel in OGC have the responsibility of responding to or initiating individual appointments with present, prospective and former employees. With the recently passed provisions in the Defense Authorization Bill - 1986, an increase in an already sizable volume of business is expected. The many complicated Standards of Conduct rules, new reporting requirements and financial disclosure inquiries that require legal response, underline the need to determine adequacy of the present operation of the ethics program. In particular, the counsel (OSD/AGC) is called upon to comment within the "Standards" on matters such as gratuities, outside employment, personal financial interests, and activities involving professional associations and contractor organizations.

(B) Staff Responsibilities

1. DoD Directive 5500.7, "Standards of Conduct". This Directive gives guidance for all of DoD and is the basis for the regulations of the components. The Directive should be reviewed and revised periodically as experience with the new procedures is gained and guidance is issued by the Office of Government Ethics, Department of Justice, General Accounting Office, and other responsible agencies. Publication of the Directive and its revisions requires customary rule-making formalities.

2. Review of Component Regulations. Each DoD component is required to issue necessary implementing instructions. These should be reviewed and approved before promulgation.

3. Coordination of the DoD position in a number of areas, including the following:

a. Position on legislative proposals for changing existing standards of conduct laws.

b. Review of new problems and areas requiring publication of guidance.

c. Harmonizing inconsistent standards within DoD components.

d. Response to investigations by GAO.

e. Handling of complications associated with processing of financial disclosure forms of the numerous military personnel not serving within their own departments.

f. Components to be proposed as "separate agencies" (pursuant to 18 USC 207(e)).

g. Positions to be designated "senior employee" positions (for purposes of 18 USC 207(c) and (d)).

h. Annual validation of designations of e. and f.

The very nature of the responsibilities in this area call for an understanding and ability to interpret current regulations and Standards as well as proposed legislation. The need for a legalistic approach to problems of inconsistent standards, coordination of DoD positions with its components and appropriate intergovernmental representation for OSD is sound reasoning for an adequate complement of staff.

VII. Analysis: DoD/OSD Ethics Program

The Designated Ethics Official of OSD is charged with the overall direction and leadership in support of the Administrations policies to preventing conflicts of interest. The DAEO has the primary responsibility within DoD/OSD for the administration of the "ethics in government" program. Leadership involves information and educational programs for DoD employees and officials; consulting with OSD officials regarding compliance with DoD ethics programs and requirements; development of DoD Standards of Conduct and coordination of DoD policy with the components. The designated official is further charged with the basic responsibility of monitoring compliance with public and confidential financial disclosure requirements.

With an understanding of these responsibilities, it is felt that initial attention to basic organizational responsibility is necessary to ensure a positive program (of ethics management) and an avoidance of uncoordinated efforts. Organization, adequate staffing and guidelined approach should minimize the incidents of "headliner" cases. A fragmented approach, with inadequate staffing is the condition of the "ethics program" in DoD/OSD that urgently needs to be addressed.

At the present time, almost all of the working-level as well as policy guidance functions are performed by two individuals.

The single employee that devotes the majority of his time to the OSD ethics program is the counsel in DoD/OGC. Although there are the usual supervisory policy decisions, the implementation and day-to-day monitoring of legal and policy issues are within the responsibilities of one counsel. Except for temporary assistance, these responsibilities have created a situation, in many cases, of rote counseling of OSD officials. Time nor support does not permit the summarizing of matters discussed in counseling sessions as recommended by the Office of Inspector General. The day-to-day workload cast upon the one counsel involved directly in the ethics program has delayed the updating of DoD, Standards of Conduct for over more than a year. New legislative action has compounded this situation.

The continuing need to meet daily "ethics" demands ranging from Advisory Committee briefings, through individual counseling sessions, to phone discussions with defense contractor representatives has seriously curtailed an affirmative approach to a healthy and representative program.

The Deputy Standards of Conduct Counselor, OASD(A), who is charged with the processing of the above mentioned reports as well as performing a basic or preliminary review of them is need of staff support. The counselor is assigned a clerical assistant who performs only basic administrative duties. The counselor devotes about 30% of her time to the processing (etc.) of the required forms and is required to perform basic counseling functions. The recently passed legislative provisions will require a more careful review of post-government employment reports.

The responsibilities that can only be adequately fulfilled by a properly staffed and well organized program are lacking in the OSD ethics program. A careful appraisal of DoD/OSD program by the Office of Government Ethics would uncover many of the deficiencies that are obvious to those in the program and are referred to in this memorandum. Such an intra-governmental appraisal would cause less damage to the DoD mission than an expose from a Congressional or non-governmental source.

VIII. Conclusions:

The present ethic program in DoD/OSD is entirely inadequate due to:

(A) insufficient staffing

(B) the separation of the Designated DoD Ethics Official (and alternate) from the counsel who carries the principle responsibility to assure OSD officials compliance with ethics laws and regulations.

Recommendations:

A. General

That an ethics program for DoD/OSD be established with sufficient staff support in order to meet the standards which will best serve the Department of Defense.

The recent and continuing legislative initiatives will place a further burden on an existing ethics program that already is assigned a low priority.

The need for immediate revision for proper implementation of the Ethics in Government Act is critical.

Also, the political realities existing in the current atmosphere call for a "high-visibility" recognition of the role the Office of Ethics must play in the Office of Secretary of Defense.

B. DoD/OSD Ethics Office Options

(1) That assignment of the Designated Ethics Official be continued as it presently exists. That is, that the Deputy Assistant Secretary of Defense (Administration), OASD(C), continue as the DoD/OSD Ethics Official and the Director of Personnel as the designated Alternate.

(a) that the Ethics Counsel, OGC, be assigned an assistant ethics counsel on a full-time basis as well as a secretarial assistant.

(b) that the Ethics Counsel be formally designated as Ethic Counsel, OSD/OGC.

(2) That the Deputy Assistant Secretary of Defense (Administration) be continued as the Designated Ethics Official, DoD/OSD (as well as his Alternate). However, an Office of Chief Ethics Counsel be created in the ODASD(A).

(a) such counsel be assigned an assistant Ethics Counsel, an administrative assistant (Deputy Standards of Conduct Counselor) and two secretarial/clerical assistants (full-time).

(3) That the Deputy Assistant Secretary of Defense (Administration) be continued as the designated Ethics Official, DoD/OSD. That the Alternate be an attorney and designated as Chief Ethics Counsel and be located in the Office of the DASD(A).

(a) the Ethics Counsel would be supported by an assistant ethics counsel as well as an administrative assistant (Deputy Standards of Conduct Counsel).

(b) two full-time secretarial/clerical assistants be assigned to the Ethics Office.

4. That an Assistant General Counsel be designated as the DoD/OSD Ethics Official. That the Alternate also serve as Chief Ethics Counsel. In the transfer of the ethics function to the OGC that the Assistant General Counsel be charged with the overall legal responsibility of the DoD/OSD ethics program. This would require active participation in the counseling of high DoD/OSD officials and participation in policy guidance for the components and and non-governmental parties. The Assistant General Counsel would also participate, and give policy direction on all legislative initiatives in coordination with OASD/LA.

The Assistant General Counsel would be supported by the Chief Ethics Counsel (also designated Alternate) who would have legal as well as administrative responsibilities in the ethics program.

(a) that the ethics staff in the Office of General Counsel be increased to include an (i) assistant ethics counsel; (ii) a Deputy Standards of Conduct Counselor, who would perform administrative support duties, and (iii) a full-time secretarial assistant.

5. That the DoD/OSD ethics program be transferred to the Office of Assistant Secretary of Defense (Force Management and Personnel). That a Deputy Assistant Secretary be assigned as DASD-Ethics as well as designated Ethics Official. That his alternate also be titled as Chief Ethics Counsel, DoD/OSD.

That the Deputy Assistant Secretary have overall responsibility of the DoD ethics program.

(a) that the Chief Ethics Counsel be assigned an Assistant Ethics Counsel, a Deputy Standards of Conduct Counselor who would perform administrative support; two full-time secretarial/clerical assistants.

John R. MacKenzie
Office of Legal Counsel

FINAL REPORT ON GRATUITIES AND STANDARDS OF CONDUCT ISSUES RELATING TO DEPARTMENT OF DEFENSE PROCUREMENT

84FDH006

FEBRUARY 17, 1987

The Office of the Inspector General
Department of Defense

Criminal Investigations Policy and Oversight

REPORT OF GRATUITIES AND STANDARDS OF CONDUCT ISSUES RELATING TO DEPARTMENT OF DEFENSE PROCUREMENT

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REPORT ON GRATUITIES AND STANDARDS OF CONDUCT ISSUES RELATING TO DEPARTMENT OF DEFENSE PROCUREMENT

PART I - INTRODUCTION

The integrity of Department of Defense employees, particularly in the procurement community, is the single most important factor in preventing and detecting fraud, waste and abuse in Defense operations and programs. As such, an effective ethics program, with clear and definitive Standards of Conduct and guidance on gratuity issues, is critical to ensuring the integrity of Defense personnel and programs.

In order for an ethics program to be effective within the Department of Defense, that program must provide a clear and understandable statement of the standards expected of the employees and must be coupled with a uniform and coordinated approach to the application and enforcement of those standards. In the absence of such understandable and uniform guidance, employees become lost in the maze of interpretations and applications of the standards.

This review of Standards of Conduct issues has been specifically directed to the application of the standards to departmental procurement personnel, with a special emphasis on the problem of gratuities.

Background

The DoD Directive 5500.7, dated January 15, 1977, prescribes Standards of Conduct required of all DoD personnel, regardless of assignment. Implementation of the Directive has been effected within the various elements of the Department through a wide variety of regulations, instructions, and policy statements, each containing individual guidance on how the Directive is to be interpreted and applied within their area of operation.

Since 1977, numerous laws and regulations have been promulgated which have imposed additional restrictions and standards on Government employees. Today, an employee is forced to refer to a multitude of laws, directives, regulations and instructions, with varying implementing guidance from local commanders, in order to understand the Standards of Conduct expected of the employee in each assignment undertaken.

While the Office of General Counsel is currently working on a revision of DoD Directive 5500.7, which would incorporate changes in the laws since 1977, the latest draft fails to assign overall responsibility for an ethics program and does not sufficiently address other areas in the program which are a current source of confusion and misinterpretation of the standards.

Objectives and Scope

This review was undertaken in an effort to:

- Identify those areas of confusion which currently exist in the Standards of Conduct program; and
- Identify corrective action which might be taken by the Department in order to:
  - Eliminate that confusion; and
  - Ensure proper enforcement of the standards.

The review was conducted by the Office of the Assistant Inspector General for Criminal Investigations Policy and Oversight. It consisted of a review of written material and regulations, both currently in effect within DoD and the Military Departments, and those being drafted for implementation, along with program and policy statements of selected commands. Numerous criminal investigations involving allegations of gratuities provided by Defense contractors were also reviewed and senior officials within DoD were interviewed.

A draft report of our initial findings and recommendations was presented for comment to the DoD General Counsel, Secretaries of each of the Military Services and the Director, Defense Logistics Agency. Responses specifically addressing our draft report were received from each of the Services and the Defense Logistics Agency. The Office of General Counsel responded by stating that our views would be considered in their preparation of the new Standards of Conduct Directive. Where this office agreed with the comments received, appropriate changes, deletions or modifications were made to our findings and recommendations. Where disagreements exist, our draft finding and recommendations are presented, followed by comments received and the final Inspector General position.

Summary Evaluation

While the Department of Defense has historically operated a relatively effective Standards of Conduct program, changes in legislation and lessons learned from recent experiences have created a need for updating and improving this program.

While the current revision of the Standards of Conduct Directive by the Office of General Counsel is a step in the right direction, additional considerations must be made if the Department is to operate an effective ethics program. These considerations would include provisions relating to the following subjects which are discussed in more detail in Part II of this report.

- All DoD procurement organizations should institute a policy barring the provision and acceptance of all gratuities.
- A specifically tailored Standards of Conduct training program should be developed for procurement personnel.
- Ethics officials should be encouraged to issue written reports for both post employment and conflict of interest situations.
- Each Military Department and the Defense Logistics Agency should create a permanent gratuities board.
- Disciplinary actions against DoD employees should be coordinated with adverse contractual action against contractors who provide gratuities, and should receive wide dissemination throughout the organization.
- The payment of honoraria by DoD contractors to DoD personnel should be prohibited, and this policy should be widely disseminated, particularily within the DoD medical commmunity.
- The Office of General Counsel should assume responsibility for development of an ethics program within DoD. This program should provide for:
    - the review of opinions by senior Military Department and DoD ethics officers;
    - the reporting of disciplinary cases; and
    - dissemination of selected opinions throughout DoD to provide guidance on ethics issues.

PART II - FINDINGS AND RECOMMENDATIONS

A. Application of Standards of Conduct to Procurement Personnel

Although the provision of gratuities by DoD contractors, and their acceptance by DoD employees, is prohibited under Federal criminal law, DoD regulations, and specific provisions of DoD contracts, recent cases dealing with major Defense contractors demonstrate that gratuities remain a problem. This is due, in part, to regulations which allow for numerous exceptions regarding meals, promotional items and public ceremonies and to the variety of implementing rules employed by numerous DoD procurement authorities regarding the types of gratuities that may be offered and accepted.

The confusion which results from the myriad regulations and implementing policies is especially problematic when addressing standards for procurement personnel, where violations arguably have the greatest adverse impact on departmental operations. Indeed, the need for the highest standards of accountability in the procurement area was voiced by Congress in the passage of the Defense Procurement Improvement Act of 1985 (Title IX, P.L. 99-145). One feature of that Act, for example, provides that any claim by a contractor for reimbursement of the expense of a gratuity is a civil and criminal violation of the False Claims Act (10 U.S.C. 2324 (i)).

An example of the present confusion surrounding the standards is found in the acceptance of promotional items. The current DoD Standards of Conduct Directive allows the acceptance of "unsolicited advertising or promotional items that are less than $5 in retail value." However, because the actual values of such items are rarely determined, DoD employees have on occasion accepted relatively high value items in the mistaken belief that they fall within the exception for items under $5. While the proposed Standards of Conduct Directive raises the limit to $10 and allows for the acceptance of certain refreshments, such as coffee and donuts, the standards still do not provide adequate guidance for establishing the retail value of an item.

Another example of confusion involves the Standards of Conduct exception that allows the acceptance of gratuities in public ceremonial activities. Navy officials have used the exception to justify the attendance of hundreds of Navy officials and their families at ship launching and keel laying ceremonies, the expenses for which are incurred by the contractor who built the vessel.

Such ceremonies at major commercial shipyards have involved the provision of meals and entertainment worth over $200 per person. In many instances, transportation and accommodations, worth hundreds of dollars more, were also provided. In still other instances, senior DoD and Navy officials and their families received jewelry and other memorabilia worth thousands of dollars. Activities such as this clearly violate the purpose of the Standards of Conduct. Congressional concern regarding abuses in this area led to the passage of a new restriction regarding mementoes at ship launchings (P.L. 99-445, Section 145). The new law limits mementoes to an aggregate of $100 per family. It is questionable why DoD should limit promotional gratuities to $10 in most instances, but allow for the full Congressional maximum of $100 at ship launching and similar ceremonies.

Documented instances such as these have also demonstrated that major corporations could engage in a substantial pattern and practice of providing gratuities to DoD officials without any fear of condemnation or punishment.

The resulting confusion regarding acceptable behavior under the Standards of Conduct is compounded by a lack of training regarding the standards. While initial briefings and annual reminders of the regulations are given to all DoD employees, current policies do not require any additional training for procurement personnel. As a result, the training received by procurement personnel is often ineffective in alerting them to special Standards of Conduct problems in the procurement environment.

Recommendations

To eliminate confusion regarding the kinds of gratuities that can be offered and accepted, we recommend that the following actions be taken:

1. All procurement organizations within DoD should establish an absolute bar on the provision and acceptance of all gratuities from contractors. Such a prohibition was adopted by the Army Materiel Command (AMC) in August 1984 and AMC officials report that the program is working well.

2. The policy should be reinforced by the development of a specific Standards of Conduct training program which would be provided to all procurement officials at least on an annual basis. The training should include the development of materials such as films and brochures containing specific guidance which alerts procurement personnel to Standards of Conduct problems which can arise in the procurement area. The materials should be tailored to each procurement command so as to incorporate information on unique situations. Such training

for procurement officials would be in addition to the new employee briefings and annual reminders which are mandated for all employees (See Army Regulation 600-50, para 1-6; SECNAVINST 5370.2H, para 8; Air Force Regulation 30-30, para 12).

3. Section 1461 of the FY 1986 DoD Authorization Act (P.L. 99-145) limits gratuities which can be provided to Federal officials and their families at shipbuilding ceremonies to $100. By regulation, DoD should extend that ban to similar ceremonies, such as vehicle and aircraft rollouts, and limit the allowable dollar value to $10.

Comments

ARMY

1. We support this recommendation. As noted in the draft report, the Army Materiel Command has been following this practice for more than eighteen months.

2. We support the recommendation for improved Standards of Conduct training. The recently revised Army Regulation 600-50, Standards of Conduct, due to be published this summer, requires commanders in conjunction with their ethics counselors to ensure that ethics training focused on issues of concern to the particular organization is given on a regular basis. We do not think it is practical for a Military Service to mandate identical Standards of Conduct training for all its personnel, since the requirement for training in various subject areas would differ dramatically from one assignment to another. On the other hand, general training applicable to all procurement officials throughout DoD could be prepared centrally to avoid duplication of effort.

3. We support this recommendation. The $10 dollar limit on gratuities at rollout ceremonies already has been incorporated in the revision of AR 600-50.

NAVY

I understand an absolute bar on all gratuities will be considered with Office of the Secretary of Defense (OSD) and the other services in the staffing of the new DoD Standards of Conduct Instruction. The question is whether the rule of reason which is inculcated in our Standards of Conduct instruction must be surrendered to a draconian approach to solve this problem. With respect to Standards of Conduct training, the Navy already is in the process of tailoring this training to the special circumstances of its procurement personnel.

AIR FORCE

Nonconcur....
We view the efficacy of an absolute bar as doubtful.
(Note: A portion of the Air Force comments were omitted as they addressed a portion of the draft report which has been omitted in this final report.

DEFENSE LOGISTICS AGENCY

1. As a concept, we agree that an absolute prohibition against accepting gratuities would eliminate many of the uncertainties surrounding the current policy and would simplify program administration. However, we see no reason why whatever policy is established should not be applied to all DoD personnel, rather than limited only to procurement personnel. With respect to a strict prohibition, our experience has been that there are circumstances, albeit rare, when it is appropriate to allow the acceptance of gratuities. A few examples of such cases are: acceptance of emergency medical treatment from a contractor's on site staff physician and acceptance of contractor provided transportation where commercial transportation is not reasonably available and there is no increased cost to the Government. We would support substantial limitations on the acceptance of gratuities recognizing the need to make allowance for the truly unusual case.

2. In 1984, the DLA General Counsel established a group of senior field attorneys to review the operations of each field legal office. That concept became known as "Peer Review." A peer review team visited each field legal office and essentially looked at what they were doing and how they were doing it. One of the areas that was looked at was the Standards of Conduct program. As a result of the peer review effort and a subsequent meeting of all field activity chief counsel, it was agreed that standardized training materials (films, pamphlets, briefing topics, etc.) would be helpful. A team of attorneys was established and recently completed compiling these materials in a four volume set made available to each DLA field office. These standardized materials are to be used in the semiannual reminder and training sessions required by the DLA Standards of Conduct Regulation. Because of the close relationship between Standards of Conduct and fraud reporting and detection, the materials will also be used in educating our employees concerning fraud detection and reporting. The scope and organization of these materials permits local Counsel to tailor the Standards of Conduct briefing to the particular audience.

3. Concur. We believe, however, that there should be a uniform DoD policy applicable to all similar situations.

IG-DOD POSITION

Any question concerning the efficacy of an absolute bar on the receipt of gratuities has been answered by the experiences of the Army Material Command whose program has operated effectively since August 1984. While we have no objection to extending the absolute bar on gratuities to all DoD personnel, as suggested by DLA, our primary focus and concern here is with the inherent dangers posed by gratuities to the procurement process.

We also acknowledge that there are rare instances, such as the medical emergency and transportation examples given by DLA, where reason would dictate that DoD personnel accept some "gratuity" from a DoD contractor. Those instances could easily be covered by allowing a limited number of exceptions, when approved by the individual's superiors in advance or when notification of the "gratuity" is made to the individual's superiors immediately following its receipt. Additionally, while the Navy expressed a concern for a draconian approach of an absolute bar, we certainly acknowledge that the "rule of reason" should be applied in taking corrective action in response to violations of the policy.

B. Standards of Conduct Counseling

Current regulations require DoD personnel to consult legal counsel or, if appropriate, a Standards of Conduct counselor, for guidance in any matter where the propriety of a proposed action or decision in terms of the regulation or law is doubtful. As has been demonstrated by recent cases, such consultations and advisements by counselors, when conducted on an informal and oral basis, can result in subsequent conflicts between the employee and the official as to what facts were presented and what opinions were given during the discussions.

Recommendation

Current Standards of Conduct regulations should be amended to encourage that all requests for advisory opinions on conflict of interest and post employment issues, and all opinions by ethics officials on such issues, be in writing. Such written reports for post employment situations are encouraged by Section 923 of the Defense Procurement Improvement Act of 1985 and are required in certain cases by Section 931 of the 1987 Defense Authorization Act (P.L. 99-661, 10 U.S.C. Section 2397b(e)). Written opinions should be encouraged to the greatest extent possible for both conflict of interest and post employment issues. Conflicts between the employee and the ethics official regarding what facts were presented and what opinions were given can only be avoided by requiring employees to disclose fully all relevant facts in writing, and by having the ethics official provide a written opinion.

Comments

ARMY

A requirement that all opinions by ethics officials on conflict of interest and post-employment issues be in writing would be unduly burdensome. Although we recognize that a greater proportion of these opinions than in the past probably should be in writing, oral opinions often are sufficient and appropriate. We fear that in many cases having a requirement for all requests for advisory opinions in these areas to be in writing will inhibit employees from seeking advice.

NAVY

Ethics advice should be sought and rendered in writing in situations involving conflicts of interest and post-employement issues and other cases where in the ethics counselors judgment it is necessary. To require the total volume of ethics counseling to be conducted in writing would swamp the program's resources.

AIR FORCE

Nonconcur. Flexibility is an essential element of the efficient use of staff and administrative resources. We believe the judgment of the Ethics Counselor must govern this area. Written opinions are presently issued in those situations as deemed appropriate.

DEFENSE LOGISTICS AGENCY

While we agree that there are situations when requests and responses must be in writing, we think that requiring written documentation in all cases may adversely affect the program. One of the basic philosophies of our program is to encourage our employees to discuss their Standards of Conduct questions with their legal advisor at an early stage.

IG-DOD POSITION

While we still believe that requests for opinions and the opinions of ethics officials concerning both post employment and conflict of interest situations should always be in writing, we understand the objections of the Services and the DLA. With these objections in mind, we believe that ethics officials should, as a minimum, be encouraged to issue written reports for both post employment and conflict of interest situations whenever possible and that such reports be required when the ethics official has reason to believe that the situation may be the subject of future concern within DoD. It should again be noted that 10 U.S.C. Section 2397b(e) requires written opinions in cases covered by that statute.

C. Actions Against Contractors Who Provide Gratuities

Improved training and Standards of Conduct regulations for DoD procurement personnel will enhance the integrity of DoD contracting operations. However, additional steps must be taken against DoD contractors who seek to obtain favorable treatment through the systematic violation of DoD Standards of Conduct regulations and contract provisions regarding gratuities.

While the provision of gratuities to DoD employees is a criminal violation of 18 U.S.C. 201, there have been few prosecutions of corporations for such conduct. Most gratuity cases, even those demonstrating a pattern of corporate misconduct, are declined by the Department of Justice (DOJ) in favor of administrative and contractual remedies.

The DoD has many administrative and contractual remedies which can be taken against contractors who violate the prohibitions regarding the provision of gratuities. Unfortunately, DoD procurement officials have rarely used such remedies, and most procurement officials are unaware of their availability.

Under 10 U.S.C. 2207 and its implementing regulations (FAR subpart 3.2), DoD has the authority to terminate for default any contract where a contractor has been found to have provided a gratuity to a Government official. Furthermore, DoD can assess a penalty against the contractor for an amount equal to three to ten times the value of the gratuity. Despite the availability of those contract remedies for over 20 years, there was no reported instance of DoD using the remedy until 1985 when the Navy created an Ad Hoc Gratuities Board to review gratuities given to Admiral Hyman Rickover by four major Navy contractors. In a number of other cases dealing with significant gratuities to senior DoD officials, no consideration was ever given by responsible officials to utilizing the contractual remedy.

Under 18 U.S.C. 218, Federal agencies have the authority to rescind any contract tainted by a conviction for bribery, gratuities or conflict of interest. Despite the fact that the statute has been in effect for over 25 years, it has never been used. At the request of DoD, the President issued Executive Order 12448 in November 1983, authorizing Federal agencies to use the statute. After lengthy delays, the

Executive Order was finally implemented in July 1986 as FAR subpart 3.7.

As a result of a lack of prosecutive attention by the DOJ, and a lack of adequate contract and administrative action by DoD, there is an appearance in the procurement community that DoD tolerates the improper provision of gratuities by contractors.

Recommendations

To address properly the problem of provision of gratuities by contractors, the following actions are recommended:

1. As recommended above, a policy absolutely barring the provision of all gratuities by DoD contractors to DoD employees should be established within all DoD procurement organizations. The policy should be communicated to all DoD contractors through notification letters and during the contracting process.

2. Each of the Military Departments and the Defense Logistics Agency should create a permanent gratuities board charged with implementing the provisions of 10 U.S.C. 2207. Regulations should be established which require that any incident involving the provision of a gratuity by a contractor will be reported to the board for appropriate action.

3. Every effort should be made to ensure that implementing regulations are issued for 18 U.S.C. 218 and that the statute is used in all appropriate cases.

4. The DoD should encourage the DOJ to institute criminal prosecutions against DoD contractors who engage in a significant pattern and practice of providing gratuities to DoD employees.

5. Each of the Military Departments and the Defense Logistics Agency should ensure that all contracting officials are aware of the administrative and contractual remedies for gratuities.

Comments

ARMY

1. (See Army comment #1 to A above) Not only has AMC notified contractors of this policy, but when a violation occurs, the contractor receives a warning letter from the command.

2. We support this recommendation and will explore means of implementing it.

3. We support his recommendation but note that its application would be limited since it applies only in the case of a final criminal conviction.

4. (No comment).

5. We support this recommendation and will explore means of implementing it.

NAVY

The establishment of a permanent gratuities board will be considered by the Navy in consultation with DoD.

AIR FORCE

Concur in principle.

We are presently in the process of staffing the implementation of a Gratuities Board.

By direction of the President (E.O. 12448, Nov 4, 1983), any effort to promulgate regulations implementing 18 U.S.C. Section 218 must be pursued jointly by DoD with GSA and NASA.

Air Force investigative agencies follow an active policy of presenting relevant cases to DOJ for criminal prosecution. However, the final decision on prosecution is solely within the province of DOJ.

DEFENSE LOGISTICS AGENCY:

1. See comment #1 (to Section A above). In addition, we agree that DoD should make every reasonable effort to inform contractors of the prohibitions concerning gratuities.

2. We agree with the objective of the recommendation that when faced with a gratuity violation, the remedies available to the Government under 10 U.S.C. Section 2207 should be considered. It seems to us that establishing a permanent "gratuities board" is not an essential ingredient in assuring that all available remedies are considered and appropriate ones pursued.

3. Concur.

4. (No comment).

5. Concur. The coordination of remedies approach to gratuities and the need to ensure that contracting personnel are aware of the available remedies is essential. We have prepared and distributed for the use of DLA field activities, a Remedies Handbook to facilitate achieving this objective. We have stressed the coordination of remedies as part of the DLA Fraud Program and our Fraud Counsel at each DLA Primary Level Field Activity is responsible for advising contracting personnel and assuring that all appropriate remedies are pursued.

D. Actions Against DoD Employees Who Receive Gratuities

In addition to taking adverse actions against contractors who provide gratuities, DoD must also take firm disciplinary action against DoD employees who accept gratuities. In many instances, DoD employees actually encourage the provision of gratuities, and in some cases such efforts amount to virtual extortion. In one recent case, an Air Force colonel serving as a Defense Contract Administrative Services Management Area Commander, and two senior staff members, insisted that contractors pay for meals, accommodations and other travel expenses. The three individuals succeeded in receiving over $40,000 in such reimbursements during the life of the scheme. Although the colonel was convicted in U.S. District Court, no adverse administrative action was taken against him and he was allowed to retire from the Air Force. The two civilian employees were also convicted and were dismissed by the Defense Logistics Agency.

When significant gratuity abuses are discovered involving Government employees, various adverse administrative actions may be taken. However, many appropriate actions are never considered. For example, actions are rarely taken to recover the value of the gratuity from the Government employee. While the Government clearly has a right to such reimbursement (Continental Management Incorporated v U.S. 527 F2d 613 (6th Cir. 1975)), procedures have not been developed to ensure that such reimbursement is obtained.

Since criminal prosecution is often not taken, prompt administrative disciplinary action is essential. Furthermore, any employee disciplinary action should be taken in a coordinated manner with the adverse contractual action taken against the contractor.

Recommendations

1. All procurement organizations within DoD should establish a clear policy regarding disciplinary actions for acceptance of gratuities. The results of disciplinary actions (without employee identification) regarding acceptance of

gratuities should receive wide dissemination throughout the organization.

2. An administrative procedure should be established to allow for the recoupment from DoD employees of the value of any gratuity accepted.

3. Disciplinary actions against employees should be taken in a manner which is coordinated with adverse contractual action against the contractor who provided the gratuity.

4. The DoD should encourage the DOJ to institute criminal prosecutions against any DoD employee who engages in a significant pattern and practice of accepting gratuities from DoD contractors.

Comments

ARMY

1. We support this recommendation. We also recognize the need to evaluate each case on its own merits, both in the interest of fairness and to avoid problems of improper command influence in cases under the UCMJ.

2. We support this recommendation and will explore means of implementing it.

3. We are in favor of appropriate disciplinary action against employees who accept gratuities, but we are not sure exactly how this would be "coordinated" with adverse contractual action against the contractor who provided the gratuity. Usually the same evidence would support both actions and they could be coordinated to that extent.

4. We support this recommendation, recognizing, however, that DOJ has its own priorities.

NAVY

Publicizing the fact that an individual employee was disciplined for violation of the Standards of Conduct must be handled with care. Under long-standing Federal civilian personnel policy a violation which does not lead to separation or change of status should not be publicized as the employee's right to privacy should be of paramount interest. This would not rule out the publication of statistics regarding discipline meted out for Standards of Conduct violations for its deterrent effect.

AIR FORCE

Concur in part. Disciplinary procedures under existing regulations provide supervisors clear guidance on imposing disciplinary action. Releasing the results of disciplinary actions would have to be consistent with the Privacy Act and implementing regulations. The necessity of timely disciplinary action will not always allow for coordination of action against offending employees and contractors.

DEFENSE LOGISTICS AGENCY

1. As noted in your findings, we do take appropriate disciplinary action against employees who accept gratuities. The Heads of our Primary Level Field Activities are advised of significant criminal actions. In addition, we routinely highlight the Fraud/Waste/Abuse/Standards of Conduct arena in our monthly news magazine, DLA Dimensions.

2. We agree with your recommendation.

3. As noted earlier, we agree with applying the coordination of remedies approach to gratuities.

4. Concur.

IG-DOD POSITION

The Inspector General recognizes the requirements imposed by the Privacy Act in regard to dissemination of disciplinary actions. Results of disciplinary actions in Standards of Conduct cases could be disseminated without improper invasions on any employee's right to privacy. Such dissemination could include a general statement of the facts involved in each case and action taken, thus providing other employees with real life guidance on expected standards of conduct and possible consequences of improper actions.

The recommendation concerning coordination of actions in connection with both the DoD employee and the contractor is not intended to be limited to the timing of adverse actions or the sharing of information to support individually planned adverse actions. In the past, gratuity or other conflict of interest cases, which resulted in adverse personnel action against a DoD employee, were frequently never considered by the procurement community for appropriate administrative or contractual action against the DoD contractor. The coordination of action recommended is intended to ensure that, as a minimum, the personnel and procurement communities share information and concerns so that appropriate corrective action is taken by each DoD element.

E. Honoraria

The DoD Standards of Conduct Directive contains a general prohibition on the acceptance of compensation from contractors who do business, or who are seeking to do business, with the Federal Government. Military Department implementing regulations do not, however, provide clear and uniform guidance in this area, particularly as it applies to honoraria from DoD contractors. There is, however, no explicit prohibition upon the acceptance of honoraria from contractors, nor is the consultation with an ethics counselor a mandatory requirement. Another section of the Army regulation specifically authorizes the acceptance of honoraria for amounts less than $2,000. The Navy guidance on this subject is similarly worded. Only AF Regulation 30-30, Attachment 7, contains a clear prohibition upon the acceptance of honoraria from DoD contractors.

Certain industries, such as drug companies, have engaged in an extensive program of providing honoraria to Government medical personnel to speak on subjects related to their products. A recent Veterans Administration (VA) Inspector General investigation disclosed that one drug company paid over $750,000 in honoraria to VA and DoD medical personnel. Many of these personnel were responsible for the procurement of company products for VA and DoD. Furthermore, a senior Army anesthesiologist was convicted for the improper receipt of honoraria from another large drug company.

The acceptance of honoraria from DoD contractors by DoD personnel clearly presents the appearance, if not the existence, of a conflict of interest.

Recommendation

The DoD guidance should clearly state that the payment of honoraria by DoD contractors to DoD personnel is absolutely prohibited. This guidance should receive wide distribution throughout the DoD medical community.

Comments

ARMY

A prohibition on the acceptance of honoraria from DoD contractors already has been incorporated into the revision of AR 600-50.

NAVY

The Navy Instruction on Standards of Conduct does not permit the acceptance of honoraria by its personnel from Defense contractors. The section referred to in the finding states only the prohibition of 2 U.S.C. Section 441 on the receipt of honoraria. The Instruction has to be read and interpreted as a whole. Since honoraria are gratuitous payments, they constitute proscribed gratuities under the Navy Instruction when offered by a Defense contractor. Consideration will be given to clarifying this position in the Navy Instruction.

AIR FORCE

Concur.

DEFENSE LOGISTICS AGENCY

Concur.

F. DoD Ethics Program

As currently constituted, there is no centralized control or oversight of the DoD ethics program. While the General Counsel of DoD promulgated the DoD Standards of Conduct Directive, the current Directive does not assign the General Counsel any role in overseeing its implementation by the Military Departments, nor does it provide the General Counsel with any specific responsibility regarding oversight of ethics officials within DoD.

Similarly, the implementing regulations of the Military Departments each require the creation of an ethics advisor at all major activities. While the General Counsel and the Judge Advocate General of each of the Military Departments are generally responsible for the ethics programs in their respective Services, there is no organizational oversight by those officials. No organization within DoD conducts regular reviews of the performance of the DoD ethics program. Neither the General Counsel, DoD, nor the General Counsels of the Military Departments conduct regular reviews of ethics matters which are presented to local ethics advisors for disposition.

As a result of this lack of central control or oversight of the DoD ethics program, there is no effective review of its operation. No statistics regarding Standards of Conduct cases are gathered and maintained by any of the Military Departments or DoD. Only the Defense Logistics Agency (DLA) maintains any degree of control over the disposition of Standards of Conduct cases arising in DLA. Information regarding Standards of Conduct cases are not transmitted to higher officials within the Military Departments or DoD. Ethics opinions are, for the most part, not memorialized and disseminated to other ethics officials. Ethics advisors in the field, who provide the majority of ethics counseling in DoD, execute their responsibilities without any meaningful guidance or oversight from senior DoD ethics officials. For the most part, the only written guidance which is available to local ethics officials is a copy of the DoD directive and the implementing regulations of the respective Military Departments.

Recommendation

The Office of General Counsel, DoD, should assume the responsibility for the development of a complete ethics program within DoD. Uniform advice and guidance on a broad range of ethics matters should be provided to all ethics advisors on a routine basis. A regular reporting system should be established that would cause Standards of Conduct disciplinary cases to be reported to the Office of General Counsel by the Military Departments and Defense Agencies on an annual basis. Furthermore, ethics opinions provided by local ethics advisors should be reviewed by senior Military Department and DoD ethics officers for completeness, accuracy and uniformity. Selected opinions should then be memorialized and disseminated throughout DoD to provide more detailed guidance on ethics affairs.

Comments

ARMY

We certainly support a broader role for the Office of General Counsel, DoD, in the ethics area. A centralized reporting system for Standards of Conduct disciplinary cases would be burdensome, but would facilitate the identification of problem areas. Senior level review of ethics opinions provided by local ethics advisors would be extremely burdensome and, in view of the wide dispersion of the Army and its approximately 300 ethics advisors, may well be impossible to administer.

NAVY

With respect to the operation of the Navy's ethics program, ethics counselors in the field regularly coordinate with and receive guidance from the Offices of the General Counsel and the Judge Advocate General; and the inspections of the Navy Inspector General include a review of activities' ethics programs. The aim of the Navy is to place qualified ethics counselors in the field who will assist their client commands in running an effective ethics program. The requirement of reports is not deemed necessary.

AIR FORCE

Concur in principle. This is an area that may merit particular General Counsel, DoD, consideration during this update and revision of DoD Directive 5500.7.

DEFENSE LOGISTICS AGENCY

Concur.

IG-DOD POSITION

It is only through a coordinated approach to the DoD ethics program that a uniform Standard of Conduct can be implemented and understood by DoD employees. This is particularly true when viewed in the context of the varied assignments obtained by a large number of active duty military personnel. While reporting requirements may not be viewed as necessary by some, it is only through a reporting mechanism that a coordinated and uniform approach can be maintained.

United States Senate
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
Testimony of Kathleen A. Buck, General Counsel
Department of Defense

Reauthorization of the Office of Government Ethics
April 13, 1988

Question from Senator Levin: Could you give us a list for the record of the specific changes that have been made in the ethics system at DoD following these reports?

Answer: The following actions have been taken by the Department of Defense during the past two years to strengthen the Standards of Conduct Program:

1. Support for new legislation on reporting of defense relationships. At a hearing of this Committee in 1985, the Deputy Secretary of Defense accepted an invitation from Chairman Levin to provide DoD representatives to work with the Committee Staff to improve the reporting system set up by section 2397 of title 10, United States Code. The product of that cooperative effort was the greatly enhanced reporting system enacted in Public Law 99-145, November 8, 1985. Not only is additional information required from reporting individuals, but the Secretary of Defense was given the authority to enforce compliance by the use of administrative penalties.

2. Establishment of Standards of Conduct Office. In June of 1986, standards of conduct responsibilities scattered throughout the Office of the Secretary of Defense were consolidated in a Standards of Conduct Office within the General Counsel Office. This Office manages the several Department-wide reporting systems. For example, in April, 1987, over 23,000 letters were sent to former DoD personnel to inform them of the reports required by §2397. This Office also offers guidance and counseling to individuals working within OSD, is the DoD point of contact for ethics questions asked by contractors and other outside individuals and organizations, and provides policy oversight for the ethics programs of the entire Department.

3. New Standards of Conduct Directive. Department of Defense Directive 5500.7, "Standards of Conduct," was issued on May 6, 1987. It included updates on recent legislation, implementations of decisions of the Office of Government Ethics and General Accounting Office, and clarified assignments of responsibilities for the administration of the DoD standards of conduct programs.

To increase awareness of the new directive outside of the Department, it was published in the Federal Register and hundreds of copies were mailed to associations and business organizations.

4. Ethics Oversight Committee. The Assistant General Counsel (Legal Counsel) chairs the DoD Ethics Oversight Committee that was chartered May 6, 1987 by DoD Directive 5500.7. The Committee includes representatives of the Designated Agency Ethics Officials of the major Department of Defense components. Meeting on an ad hoc basis, but working closely through informal communications, the Committee has improved consistency of interpretation of the ethics laws and regulations. Committee members also provide valuable feed-back from the field to the Standards of Conduct Office to make revised regulations more responsive to actual needs.

5. Implementation of New Legislation. Between November of 1985 and October of 1986 Congress enacted four laws having major impact on the DoD Standards of Conduct Program:

a. Revision of the "Defense Related Employment" reporting system mentioned in item 1, above (10 U.S.C. §2397).

b. A new report and disqualification requirement for current officers and employees seeking employment outside of DoD (10 U.S.C. §2397a).

c. New limitations on employment of certain officers and employees who have had procurement responsibilities (10 U.S.C. §2397b).

d. A new annual report from major contractors who have employed former DoD officers and employees (10 U.S.C. §2397c).

Substantial effort has been dedicated to the implementation of both the spirit and the letter of these new laws. The laws require the assignment of responsibilities; the development of new reporting forms, review procedures, contract clauses, computer tracking and filing systems, and training of ethics personnel. In addition, there is the effort required to educate all DoD personnel, both current and departed, and contractor officials, in the new requirements. Although much of the early effort, developing policies, procedures, guidelines, etc., was assigned to the Standards of Conduct Office in the Office of General Counsel, extensive implementation work also is under way in the DoD components and field installations.